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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, AND ERIC CADIN,
Petitioners,

v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Massachusetts has imposed a criminal prohibition on "enter[ing] or remain[ing] on a public way or sidewalk ... within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility." The law applies only at abortion clinics, not at hospitals or other medical facilities. The statute exempts passersby and municipal agents (such as law-enforcement officials). It also exempts people entering or leaving the clinic, and clinic employees acting "within the scope of their employment." For others, the statute makes it a crime to stand on the public sidewalk and display signs, distribute leaflets, pray in silence, or converse with willing listeners, even when there are no incoming patients in or near the zone.

The questions presented are:

1. Whether the First Circuit erred in holding—contrary to *Hill v. Colorado*, 530 U.S. 703 (2000), applications of *Hill* by other courts, and well-established First Amendment principles—that Massachusetts' establishment of unique speech-free zones around abortion clinics is consistent with the First and Fourteenth Amendments.

2. If *Hill* permits the establishment of such zones, whether it should be limited or overruled.

PARTIES TO THE PROCEEDING

All of the petitioners are listed in the caption on the cover. None of the petitioners is a corporation. *See* Rule 29.6. Respondent is listed in the caption on the cover.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals affirming the denial of petitioners' request for preliminary and permanent injunctive relief (App. 1a-28a) is reported at 571 F.3d 167. The order denying petitioners' petition for rehearing or rehearing en banc is included at App. 123a-124a. The opinion of the district court denying relief (App. 29a-122a) is reported at 573 F. Supp. 2d 382.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2009. Plaintiffs' petition for rehearing or rehearing en banc was denied on August 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law ... abridging the freedom of speech, or of the press ....

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 266, Section 120E1/2 of the Massachusetts General Laws ("the Act"), is reprinted in full at App. 125a-127a. In relevant part, Section 120E1/2 provides:

> (a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.
>
> (b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius

of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:—

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

...

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment.

STATEMENT

In 2007, Massachusetts enacted a law that creates no-speech zones on the public streets and sidewalks outside abortion clinics. For 35 feet in every direction from every entrance, exit, or driveway of an abortion clinic, the Act prohibits speakers from engaging in peaceful speech, including the distribution of leaflets, display of signs, consensual conversation, and communication with others from a normal conversational distance. Relying largely on this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000), the First Circuit found these abortion-specific no-speech zones to be neutral, narrowly tailored, and not substantially overbroad.

1. The 2007 statute at issue in this case replaced a law enacted by the Massachusetts legislature in 2000 that restricted certain speech-related conduct on public streets and sidewalks outside abortion clinics. The statute adopted by Massachusetts in 2000 prohibited making close, physical approaches within six feet of unwilling listeners outside abortion clinics. The law was designed to address "violence and aggressive behavior" outside the clinics. *McGuire* v. *Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) (*McGuire I*) (reversing entry of preliminary injunction). The Massachusetts legislature partially modeled that law on a ban on unwanted physical approaches upheld in *Hill*. *See McGuire I*, 260 F.3d at 40.

In *Hill*, this Court upheld a Colorado statute that made it a crime to "knowingly approach another person within eight feet of such person, unless such person consents." *Hill*, 530 U.S. at 707 n.1 (quoting Colo. Rev. Stat. § 18-9-122(3)). The Court's analysis in *Hill* relied heavily on the fact that the Colorado law barred only physical *approaches* and left open other means of com-

munication. Thus the Court noted that the law's 8-foot distance "certainly can make it more difficult for a speaker to be heard," but found that (i) the 8-foot distance still allows a speaker to communicate with an unwilling listener from a "normal conversational distance," *id.* at 726-727, and (ii) that the ban on close physical approaches did not preclude stationary sign-holding, and did not prevent a leafletter from "simply standing [inside the zone] near the path of oncoming pedestrians and proffering his or her material ... which the pedestrians can easily accept." *Id.* at 727. Because the prohibition on close, unwanted approaches applied equally at all health care facilities (not just abortion clinics), and to all speakers (not just abortion opponents), the Court found the law content- and viewpoint-neutral. *Id.* at 714, 726-727.

Relying largely on *Hill*, the First Circuit upheld the 2000 statute against a First Amendment challenge in *McGuire I*, 260 F.3d at 51, and *McGuire* v. *Reilly*, 386 F.3d 45, 65-66 (1st Cir. 2004) (*McGuire II*) (affirming constitutionality of the floating no-approach law). Massachusetts justified its *Hill*-inspired prohibition on close, unwanted approaches outside abortion clinics on the basis of the purported inadequacy of existing laws already regulating objectionable conduct on the public sidewalks outside these locations. For example, federal law makes it illegal to "obstruct[], intentionally injure[], intimidate[] or interfere[]" with access to reproductive health services. *See* 18 U.S.C. § 248. Massachusetts law separately prohibits interfering with any person's exercise of a constitutional right, G.L. c. 265, § 37, or obstructing access to any medical facility, G.L. c. 266,

§ 120E (2000).[1] The First Circuit accepted this rationale, upholding the 2000 no-approach law as a prophylactic measure because existing laws "cast wider nets" that might catch "big fish" but otherwise "would let the fingerlings through." *McGuire I*, 260 F.3d at 49.[2]

2. In 2007, Massachusetts amended its 2000 no-approach law. Although there was no evidence of a single prosecution in the preceding six years under any state, federal or local law directly targeting obstruction, intimidation, or violence at abortion clinics in Massachusetts, and although the State has never proven even a single violation of the no-approach law, the legislature heard testimony from pro-choice advocates and law enforcement officers that existing law had not solved the problem of confrontational protesters at abortion clinics, that enforcement of the no-approach zone was difficult, and that a 35-foot zone "where no protesters can go ... would be great ... [and] would make our job so much easier." App. 57a. The legisla-

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[1] Notably, when regulating activity outside all medical facilities, Massachusetts carefully focuses on outlawing only actual interference with access, expressly preserving "rights to engage in peaceful picketing which does not obstruct entry or departure." G.L. c. 266 § 120E.

[2] In response to a petition for certiorari, the State argued, among other things, that the 2000 law "restrict[ed] only conduct" and that "whether a narrowly tailored floating buffer zone statute—restricting no speech but only non-consensual 'approaches'—violates the First Amendment" had been resolved in *Hill*. 04-939 Br. in Opp. 13-14. The State also argued that review was "particularly unwarranted" because there was no evidence that the "unique facts" concerning the 2000 Act were "replicated in other settings across the country." *Id.* at 13. This Court denied review. 544 U.S. 974 (2005).

ture adopted the amendments over the opposition of, among others, the American Civil Liberties Union of Massachusetts, which opposed the law "mainly on overbreadth grounds." App. 58a.

The new legislation changed the no-unconsented-approach zone around abortion clinics into a no-entry-to-speak zone. Now the Act establishes a zone on the public streets and sidewalks extending 35 feet in all directions from "any portion of an entrance, exit or driveway of a reproductive health care facility." Act § 120E1/2(b) (App. 125a). The Act makes it illegal to "enter or remain" in this part of public streets and sidewalks, and provides for prison terms of up to 30 months, criminal fines of up to $5,000, and equitable relief. Act § 120E1/2(d) and (f) (App. 125a-127a).

Unlike the statute sustained by this Court in *Hill*, the revised Act does not apply to all health care facilities. Indeed, it does not apply to hospitals at all. Rather, the Act defines a protected "reproductive health care facility" as "a place, *other than* within or upon the grounds of a hospital, where abortions are offered or performed." Act § 120E1/2(a) (emphasis added) (App. 125a).

Also unlike the statute in *Hill*, the Act does not apply to all speakers. In addition to passersby and "municipal agents" (such as police and firefighters), the Act specifically exempts from its prohibitions all "persons entering or leaving" an abortion clinic and, separately, all "employees or agents of [a clinic] acting within the scope of their employment." Act § 120E1/2(b)(1)-(2) (App. 125a).

Finally, unlike the statute in *Hill*, which focused exclusively on close, unwanted approaches toward unwilling listeners, the Act prohibits non-exempt persons

from entering and remaining in the zone for any purpose. Act § 120E1/2(b) (App. 125a). Non-exempt speakers are prohibited from offering leaflets, displaying signs, engaging in conversation with even willing listeners, speaking with others at a "normal conversational distance," or even merely remaining stationary and silently holding signs on public streets and sidewalks anywhere inside the zone. *Compare Hill*, 530 U.S. at 726-727. Indeed, the Act prohibits all such activity even if there are no listeners in the zone at all. Act § 120E1/2(b) (App. 125a).

3. Petitioners regularly station themselves on public sidewalks near abortion clinics to offer women information about, and assistance in pursuing, alternatives to abortion. On January 16, 2008, petitioners sued to enjoin enforcement of the Act, arguing that it violates the First and Fourteenth Amendments. Jurisdiction was invoked under 28 U.S.C. § 1331.

4. On May 14, 2008, the district court held a bench trial on a stipulated record relating to petitioners' facial challenges.[3] In an opinion issued on August 22, 2008, it upheld the Act as a content-neutral time, place, and manner regulation. App. 29a-122a.

5. The court of appeals affirmed. App. 1a-28a. It began by stating that petitioners' arguments about the Act's exclusive focus on abortion clinics "were ad-

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[3] The Court severed and stayed the Petitioners' "as-applied" challenge. None of the plaintiffs has violated or been arrested or threatened with arrest for violating the Act. The "as-applied" challenge, therefore, focuses simply on the impact of the Act on particular clinics in light of, for example, the width of certain sidewalks, the usual placement of snow piles during inclement weather, and other clinic-specific issues.

dressed in our earlier decisions ... [which] render superfluous any exegetic discussion." App. 13a (citing *McGuire I*, 260 F.3d at 44-47 and *McGuire II*, 386 F.3d at 56-59). Thus, although it recognized that the legislature "was plainly moved to enact the statute by *the secondary effects of anti-abortion protests*," App. 21a (emphasis added), the court found any disparate impact on abortion speech did not result from "a content-based preference." App. 13a.

The court likewise concluded it is not discriminatory to permit speakers associated with the abortion clinics free use of the sidewalks, stating that argument "was squarely raised and squarely repulsed" in *McGuire I*. App. 13a (citing *McGuire I*, 260 F.3d at 45-47); *see also* App. 14a ("The decisive question in a facial challenge is not whether a regulation is necessary to achieve the legislature's stated goal, but, rather, whether a court can glean legitimate reasons for its existence."). Finding the employee exception "reasonably related" to legitimate government public safety objectives, the court rejected claims that it renders the statute content- or viewpoint-based or raises any Equal Protection concern. App. 14a.

The court found that the Act is narrowly tailored and leaves open ample alternative channels of communication. App. 15a-20a. The court dismissed as "jejune" petitioners' claims that the expanded reach of the statute outlaws peaceful leafletting on public sidewalks and restricts petitioners from speaking to listeners from the "conversational distance" discussed in *Hill*. App. 18a. It held that "the Constitution neither recognizes nor gives special protection to any particular conversational distance," and that even "handbilling is not specially protected." *Id.* It relied on *Hill* for the proposition that time, place, and manner restrictions "rou-

tinely make particular forms of expression impracticable without raising constitutional concerns." *Id.* (citing *Hill*, 530 U.S. at 726-728).

As to alternative channels of communication, the court stated that, in a facial challenge, "as long as we can envision circumstances in which a 35-foot buffer zone allows adequate alternative means of expression, the challenge must fail." App. 19a. Observing that petitioners retain their rights outside the zone to "speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities," and that "[a]ny willing listener is at liberty to leave the zone [and] approach those outside it," the court found ample alternative channels. *Id.*

As to overbreadth, the court found the legislature's change from a ban on close physical approaches toward unwilling listeners to a total ban on all First Amendment activity to be "not a matter of constitutional significance." App. 21a. The court found the case "readily distinguishable" from the exclusion of First Amendment activity on airport premises struck down in *Board of Airport Commissioners* v. *Jews for Jesus*, 482 U.S. 569 (1987), because "this case involves a time, place, and manner restriction" and the Supreme Court in *Hill* "left no doubt but that time-place-manner restrictions should not be analyzed in the same way as direct bans on speech." App. 21a.

REASONS FOR GRANTING THE PETITION

First, review is appropriate to correct the First Circuit's misapplication of *Hill*, which raises important questions requiring resolution by this Court. The First Circuit mistakenly read *Hill* to permit abortion-

specific, speaker-specific restrictions on peaceful speech that does not involve physical approaches to unwilling listeners. Massachusetts has simply abandoned all of the safeguards on which *Hill* critically relied—applicability at all medical facilities, applicability to all speakers, and preservation of the right to engage in all speech while avoiding close physical approaches to unwilling listeners. Nothing in *Hill* permits the government to create this type of permanent no-speech zone on public streets and sidewalks, nor to do so only when and where abortions are performed.

Hill is frequently cited and has been used by courts to analyze speech restrictions at a wide range of locations. The First Circuit's misreading of *Hill*—beginning with the *McGuire* cases and continuing with the decision below—has led other courts to permit much more targeted and restrictive laws than *Hill* actually allows. The Court should grant the petition to make clear that *Hill* was a narrow decision pronouncing an outer boundary of permissible regulation, not a license to ban peaceful speech to willing listeners on public sidewalks. Alternatively, if it permits such restrictions, *Hill* should be overturned.

Second, the decision below directly conflicts with decisions of other circuit courts on at least two First Amendment issues. The First Circuit's decision below (together with a decision from the Third Circuit) conflicts with decisions from the Eighth and Ninth Circuits that have rejected speech-restriction zones that go beyond merely protecting listeners from unwanted, harassing speech. The First Circuit's decision (again, together with a decision from the Third Circuit) also conflicts with decisions from the Second, Sixth, Ninth, and Tenth Circuits, which have held that this Court's decision in *Jews for Jesus*, 482 U.S. 569, applies to complete

bans on speech in public forums, even after this Court's decision in *Hill*. The Court should grant the petition to resolve these conflicts widened by the decision below.

I. The Decision Upholding A No-Speech Zone On Public Streets And Sidewalks Near Abortion Clinics Conflicts With *Hill*

A. The First Circuit's Approval Of A Law That Bans All First Amendment Activity In A Public Forum Conflicts With *Hill*

The decision below purported to rely on *Hill* to authorize a complete prohibition on public forum speech within 35 feet of each door and driveway of an abortion clinic.

In *Hill*, however, the Court relied heavily on the fact that the Colorado law barred only physical *approaches* and left open other means of communication. For example, the Court noted that the law "does not affect demonstrators with signs who remain in place." 530 U.S. at 726. The Court also stressed that Colorado's ban on close physical approaches did not prevent a leafletter from "simply standing [inside the zone] near the path of oncoming pedestrians and proffering his or her material ... which the pedestrians can easily accept." *Id.* at 727. In short, the Court recognized that the "First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' " *Id.* at 728 (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949)). The Court held that the Colorado statute "adequately protected those rights because, even though the law's 8-foot distance "certainly can make it more difficult for a speaker to be heard," the law still allowed a speaker to communicate with an unwilling listener from a "normal conversational distance." *Id.* at

726-727 (contrasting the 8-foot zone with the 15-foot zone rejected in *Schenck* v. *Pro-Choice Network*, 519 U.S. 357, 377 (1997); "Once again it is worth reiterating that only attempts to address unwilling listeners are affected."). The Court found Colorado's no-approach law narrowly tailored to the State's interest in protecting incoming patients "from unwanted encounters." *Id.* at 729. The court below ignored this aspect of *Hill* and upheld a statute that effectively criminalizes all speech on a public sidewalk—regardless of whether the speech involves any physical approach or unwilling listeners. Indeed, the First Circuit was able to reach this conclusion only by ignoring multiple precedents of this Court.

The First Circuit, for example, did not even attempt to explain how peaceful conversations with willing listeners on a public sidewalk could ever be an "appropriately targeted evil," *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988), nor how consensual conversations could plausibly implicate the public safety concerns asserted by the State. Nor did the court discuss how the Act's prohibition on stationary sign-holding, silent prayer, or peaceful offers of assistance and information could ever be "appropriately targeted evils" that raise the state's legitimate concerns under *Hill*. Nor did it explain how *Hill* could govern speech restrictions when no listeners are in the zone.

To the contrary, the First Circuit dismissed concerns that the Act outlaws peaceful handbilling and speech with willing listeners from a conversational distance on public sidewalks as "jejune."[4] App. 18a. In-

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[4] According to *Webster's Third New International Dictionary* 1213 (2002), "jejune" means: "devoid of interest or significance ... giving evidence of lack of experience or information ... immature, juvenile, puerile."

stead of considering this Court's express holdings in *Hill*, the court treated *Hill* as holding broadly that time-place-manner regulations "routinely make particular forms of expression impracticable without raising constitutional concerns." App. 18a. Based upon this misreading of *Hill*, the court found that Massachusetts' significant expansion of the Act—from a no-approach zone to a no-entry-to-speak zone—was simply "not a matter of constitutional significance." App. 21a.

The First Circuit also inexplicably found that "handbilling is not specially protected."[5] App. 18a. This is simply wrong. Handbilling in the public forum is a core First Amendment activity protected by the First Amendment's speech and press provisions. *See, e.g.*, *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). Indeed, this Court's opinion in *Hill* provided detailed analysis of the "more serious" burden on handbilling imposed by Colorado, and upheld the law only because even unwilling recipients could be offered and easily accept handbills by a stationary leafletter. 530 U.S. at 727; *see also United States* v. *Grace*, 461 U.S. 171, 180 (1983) ("The inclusion of the public sidewalks within the scope of [the] prohibition [on signs and leafleting] results in the destruction of public forum status that is at

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[5] The court's only citation for this pronouncement was *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981). But *Heffron* is not a traditional public forum case, *see id.* at 655, and therefore does nothing to reduce the protections afforded by the Constitution and this Court's cases to peaceful handbilling in the public forum. *See Good News Club* v. *Milford Central School*, 533 U.S. 98, 106 (2001) ("If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum.").

least presumptively impermissible."). In fact, this Court explained in *Ward* v. *Rock Against Racism*, why a ban on leafleting would *not* be permissible: "A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion, or noise. For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it." 491 U.S. 781, 799 n.7 (1989).

Likewise, the First Circuit dismissed petitioners' charge that the Act prohibited them from addressing their intended audience from a "normal conversational distance," declaring that "the Constitution neither recognizes nor gives special protection to any particular conversational distance." App. 18a. This Court held to the contrary in *Hill*: "More significantly, this statute does not suffer from the failings that compelled us to reject the 'floating buffer zone' in *Schenck*. Unlike the 15-foot zone in *Schenck*, this 8-foot zone allows the speaker to communicate at a 'normal conversational distance.'" 530 U.S. at 726-727; *see also New York ex rel. Spitzer* v. *Operation Rescue National*, 273 F.3d 184, 204 (2d Cir. 2001) ("The zone imposes a severe burden on First Amendment rights by effectively preventing protestors from picketing and communicating from a normal conversational distance").[6] In contrast, the Massachusetts Act precludes much normal conversa-

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[6] *See also Halfpap* v. *City of West Palm Beach*, 2006 WL 5700261, at *21, 24 (S.D. Fla. Apr. 12, 2006) (unpublished) (striking down 20-foot fixed buffer zone at medical facilities because this Court "found in *Schenk* [sic] and reaffirmed in *Hill* that a fifteen foot zone did not allow the speaker to communicate at a 'normal conversational distance.'").

tion by forcing speakers to remain beyond a 35-foot radius from clinic entrances, exits, and driveways.

The Act's complete ban on all First Amendment activity within the zone also does not leave open ample alternative avenues of communication. As set forth above, all of the avenues preserved in *Hill* are illegal here. Gone is the right to address willing listeners. Gone is the right to stand still on the sidewalk holding a sign. Gone is the right to distribute leaflets. Gone is the right to offer help at a normal conversational distance. Instead, the court below simply suggested that petitioners may go elsewhere if they wish to "speak, ... wear screen-printed T-shirts, display signs, ... [or] engage in ... lawful expressive activities." App. 19a. But petitioners have the right to engage in such "lawful expressive activities" on public sidewalks; offering them the privilege to speak elsewhere is insufficient. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Hill*, 530 U.S. at 781-82 (Kennedy, J., dissenting) (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)).

Indeed, the scope of criminal liability under the Massachusetts statute extends even beyond activists working against abortion. Both the lower courts and the Attorney General have been quite candid in acknowledging that the Act makes it illegal for passersby to discuss abortion, talk about "partisan" issues, wear political t-shirts or buttons, or even wear clothing with a Cleveland Indians logo. *See, e.g.*, App. 116a (interpreting the Act to prohibit even passersby from wearing shirts "with abortion-related or partisan messages" in the zone); *see* Oral Arg. Tr., May 5, 2009, *available at* 2009 WL 1346643, at *9 (State concession that a person wearing a Cleveland Indians shirt while passing

through the zone could be in violation of the Act); *id.* at *10 (State concession that passersby singing "We Shall Overcome" would "have to suspend" their singing as they passed through the zone). The statute likewise prohibits a wide range of speech having nothing to do with the State's asserted interests including: newspaper sales, charitable solicitations, labor organizing, petition circulation, or even just speaking on a cell phone. This chill on speech of third parties not before the Court is unacceptable. Neither *Hill* nor any other decision of this Court countenances these broad restrictions on peaceful expressive activity on public streets and sidewalks. Thus, the illegitimate sweep of the statute renders it unconstitutionally overbroad. *See, e.g., City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999) (The overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' " (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973))).

B. By Focusing Solely On Abortion Clinics, The Massachusetts Act Conflicts With *Hill*'s Content-Neutrality Analysis

Even if such a complete ban on peaceful speech in the public forum were constitutionally permissible, the Act is not neutral because its speech restrictions are solely dependent on the presence or absence of a single, often-protested activity—abortion. Unlike the statute at issue in *Hill*—which applied broadly at all health care facilities—the Massachusetts speech restrictions apply *only* to locations "where abortions are offered or performed." Act § 120E1/2(a)-(b) (App. 125a).

This singling-out of abortion is hardly accidental: the legislature was deliberately targeting abortion protesters. *See* App. 76a (noting legislature's desire to address "deleterious" effects "of anti-abortion protests" while *otherwise* "restrict[ing] as little speech as possible"). Indeed, when considering how the statute applied to speech on issues *other than* abortion, the First Circuit found that "anti-abortion protest[] ... falls squarely within the hard core of the proscriptions." App. 26a.

The courts below excused this targeting by relying on *Hill*—" 'Just as targeting medical centers did not render Colorado's counterpart statute content based, so too the Act's targeting of [only abortion clinics] fails to undermine its status as a content neutral regulation.' " App. 76a (quoting *McGuire I*, 260 F.3d at 44). In so holding, the lower courts disregarded this Court's reasoning that all patients at all health care facilities share interests in avoiding confrontational speech. *Hill* further explained that a speech-restrictive statute "lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside." 530 U.S. at 723. Colorado's no-approach statute, the Court stressed, did not "distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds." *Id.* at 724. To the contrary, the "constitutional[ly] significan[t]" point was that "all persons entering or leaving [all] health care facilities share[d] the interests served by the statute." *Id.* at 731. In assessing content-neutrality, "the comprehensiveness of the statute [was] a virtue, not a vice, because it [was] evidence against there being a discriminatory governmental motive." *Id.* Indeed, the Court explained that it

was "*precisely because* the Colorado Legislature made a *general policy choice* that the statute [was properly] assessed under the constitutional standard" for time, place and manner restrictions, rather than a stricter standard. *Id.* (emphasis added).

Massachusetts' decision to create speech restrictions that apply only when and where abortions are performed is the exact opposite of the "general policy choice" that the Court found justified intermediate scrutiny in *Hill*. *See* 530 U.S. at 731. As the lower courts candidly acknowledged, the Act was *designed* to target anti-abortion protests while regulating as little other speech as possible. App. 21a, 76a. At all other medical facilities, the State has expressly preserved the activities criminalized here, namely peaceful non-obstructive speech. *See* G.L. c. 266, § 120E (outlawing obstruction of access and impeding medical services, but expressly preserving the "right[] to engage in peaceful picketing which does not obstruct entry or departure"). Thus, at general service facilities where speakers might be expected to speak about any number of issues (labor disputes, animal testing, etc.), the State has focused solely on obstruction and has preserved peaceful speech; where speakers are only likely to be protesting abortion, the State has criminalized even peaceful, consensual speech, even if no incoming patients are in the zone.

Massachusetts is not free to create special criminal speech restrictions surrounding abortion. Under *Hill*, a regulation tied so narrowly and directly to a single controversial issue, while failing to protect the same asserted state interests at thousands of other locations where those interests are implicated separately from abortion, cannot fairly be called content-neutral.

C. The Statutory Preference For Clinic Speakers Conflicts With *Hill*'s Requirement Of Viewpoint Neutrality

The First Circuit also failed to follow *Hill* by permitting the State to grant special speech rights to speakers from abortion clinics, even while denying those same rights to speakers opposed to abortion. The First Circuit expressly held that it was "legitimate" for the state to privilege these speakers over others in the public forum. App. 13a-14a.

The government may not "discriminate against speech on the basis of its viewpoint." *Rosenberger* v. *Rector*, 515 U.S. 819, 829 (1995). Nor may the government "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972).[7]

The *Hill* Court emphasized that Colorado's no-approach law passed this threshold test:

> [T]he relevant First Amendment point is that the statute would prevent both [pro-abortion and anti-abortion] speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion.... It applies to all "protest," to all "counseling," and to all demonstrators [,] ... whether they oppose or support ... [the] abortion decision. *That is*

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[7] Creating different classifications that discriminate on the basis of viewpoint, as the State has done here, violates the Equal Protection Clause of the Fourteenth Amendment as well as the First Amendment. *See Mosley*, 408 U.S. at 96.

> *the level of neutrality that the Constitution demands.*

530 U.S. at 725 (emphasis added); *see also, id.* at 731 ("As Justice Jackson observed, 'there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.'" (quoting *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (concurring opinion)).

In stark contrast, the decision below upheld as neutral an Act that clearly does not apply equally to both sides of the abortion debate. On its face, the Act specifically exempts all "employees or agents of [the clinic] acting within the scope of their employment." Act § 120E1/2(b)(2) (App. 125a). This Court has recognized that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue* v. *Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978)); *see also R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992) (government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."). Here, the exemption for clinic speakers, with its "scope of their employment" limitation, is viewpoint-based *on its face*: Any privileged speech will *necessarily* express the clinic's view. *See McGuire II*, 386 F.3d 45, 51-52 (citing evidence that clinic speakers engage in pro-choice speech); *see also Hoye* v. *City of Oakland*, 2009 WL 2392133, at *8 (N.D. Cal. 2009) (relying on the First Circuit's decisions in this case, *McGuire I*, and *McGuire II* in upholding a similar ordinance, despite "view[ing]

with great displeasure video clips ... in which escorts can be seen intermittently walking alongside Plaintiff and blocking Plaintiff's sign with their own, all-white signs").[8]

The lower courts were convinced that all of this is permissible under *Hill* and this Court's other cases. First, they concluded that the Act was facially valid because they could "envision" one potential legitimate reason for including the "employees or agents" exemption: "to make crystal clear ... that those who work to secure peaceful access to [abortion clinics] need not fear prosecution." App. 82a (quoting *McGuire I*, 260 F.3d at 47 and *McGuire II*, 386 F.3d at 58); App. 13a-14a.[9] Sec-

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[8] The Attorney General's attempt to "interpret" away this facial discrimination in favor of clinic speakers cannot save the statute. First, the interpretation itself is *expressly* content-based—it would criminalize public forum speech by clinic speakers if it concerns abortion or "partisan" issues but not other issues—and is therefore presumptively unconstitutional. *See, e.g., Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 533 (1980). In this regard, the interpretation itself is a clear admission that the statute is content-based—otherwise, why would the Attorney General attempt to "interpret" the Act to create special rules for clinic speech about abortion? Also, if prosecuted, such employees have been provided with an absolute defense on the face of the statute itself. Respondent cannot *broaden* the reach of a criminal statute to criminalize exempted speech in an effort to preserve its constitutionality. In any case, even as interpreted, clinic speakers can still say "Follow me, I can help you" while petitioners and others could go to jail for saying identical words on the same sidewalk.

[9] The First Circuit's approach to facial challenges in this regard—and, indeed, throughout the decision—is wholly inappropriate for the First Amendment context. As this Court's decision with respect to the facial challenge at issue in *Hill* demonstrates, there is nothing about the content-neutrality inquiry that changes at the facial challenge stage. Nor does the facial context somehow

ond, the lower courts relied on *McGuire I*, where the court of appeals speculated that the legislature "could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners." *See McGuire I*, 260 F.3d at 46; App. 13a (relying on its *McGuire I* analysis); App. 81a-82a (quoting *McGuire I*, 260 F.3d at 46); *see also* App. 80a ("The employee exemption ... is neutral on its face") (quoting *McGuire I*, 260 F.3d at 48).

None of this is remotely satisfactory. First, when a statute impinges on First Amendment rights, a court

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raise the bar for showing that a statute is or is not content-based or overbroad. "After all, whether a statute is content neutral or content based is something that can be determined on the face of it[.]" *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment). Indeed, overbreadth challenges are almost always facial challenges. *See, e.g., Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965) ("By permitting determination of the invalidity of [overbroad] statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation."). The First Circuit's approach would permit the government to chill speech with broad laws and then avoid review unless and until the government chooses to apply them, forcing speakers to risk criminal sanctions in order to test the legitimacy of the restrictions. This the Constitution forbids. *See Dombrowski*, 380 U.S.at 486-487. In any event, this case proceeded with a bench trial on a stipulated trial record (not the mere summary judgment record upon which the Court decided *Hill*), and the Attorney General has already expressly announced how the State will enforce the law. Therefore, the two principal reasons courts sometimes wait for as-applied challenges—to have a factual record and to see how the law will be enforced—simply are not implicated here. *Cf. Gonzales* v. *Carhart*, 550 U.S. 124, 167 (2007) (contrasting the circumstances at issue in that case with the "latitude given facial challenges in the First Amendment context").

may not simply postulate legislative aims that might support it and require the challenger to show that a facially biased provision "admits of no constitutionally permissible application," as the court opined in *McGuire I*. 260 F.3d at 47. To the contrary, in the First Amendment context it is the *State's* burden to establish the necessity for and propriety of regulation. *See, e.g., Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 661 (2004); *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000). Here, the First Circuit applied what amounts to a *rational basis* test. That approach has no place in First Amendment cases.[10]

Second, the alleged "legitimate" reasons the courts below suggested for the facially discriminatory employee exemption are themselves viewpoint-based and thus not legitimate. A State may not include a special statutory exemption to make "crystal clear" that those

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[10] The court of appeals apparently believed that one conceivable legitimate purpose for a facially discriminatory exemption insulates it from facial attack. App. 12a (citing *McGuire I*, 260 F.3d at 44). That is incorrect. Where a law discriminates on its face on the basis of content or viewpoint, it is subject to strict scrutiny and presumptively invalid. *See, e.g., Playboy Entm't Group, Inc.*, 529 U.S. at 817; *R.A.V.*, 505 U.S. at 382. Such a law has *no* permissible applications unless its terms are narrowly tailored to serve compelling governmental interests. *See Playboy Entm't Group, Inc.*, 529 U.S. at 813 ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest"); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642-643 (1994) ("But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases.... *Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.*" (emphasis added)).

who "work to secure peaceful access" to abortion clinics "need not fear prosecution" for their speech while denying the same clear protection to those who work to offer the same listener peaceful access to abortion alternatives, such as adoption. *See* App. 80a. The First Circuit's approval of this course as neutral violates the constitutional "demand" that such speech restrictions apply equally to all speakers "whether they oppose or support" the abortion decision. *Hill*, 530 U.S. at 725; *see also Mosley*, 408 U.S. at 96; *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional"). Nor may the government regulate public forum speech based on predictions like the one the lower court made here in reliance on the *McGuire* cases—that speakers of a particular viewpoint (those from the clinic) are less likely to engage in "unwanted" speech than those with a different view. *See Mosley*, 408 U.S. at 100-101.

D. This Court Should Grant The Petition To Articulate Clear Limits On *Hill*, Or, Alternatively, To Overrule *Hill*

This Court granted review in *Hill* "[b]ecause of the importance of the case." 530 U.S. at 714. In resolving the sensitive question that case presented, the Court noted the "legitimate and important concerns" on each side, including the "clear and undisputed" First Amendment interests weighing against a law that "unquestionably lessened" the ability of pro-life speakers "to communicate [their message] effectively" in " 'quintessential' public forums." *Id.* at 714-715.

Review here is important because, as explained further below in Section II, courts around the nation

have relied on the First Circuit's misreading of *Hill* to reach a variety of conclusions about important First Amendment issues.[11] Indeed, these issues are important far beyond the context of abortion clinics, and *Hill* has been used to uphold speech restrictions in a wide variety of locations. For example, the Ninth Circuit applied *Hill* to approve speech restrictions at a trade organization meeting. *See Menotti* v. *City of Seattle*, 409 F.3d 1113, 1124-1125, 1141 n.52 (9th Cir. 2005) (deeming neutral restrictions designed to cover the exact time and exact perimeter of meeting). And other courts have applied *Hill* to uphold speech restrictions specially protecting hunters and funerals. *See Shuger* v. *State*, 859 N.E.2d 1226, 1232-1233 (Ind. App. 2007), *transfer denied*, 869 N.E.2d 454 (Ind. 2007) (Indiana Hunter Harassment Act); *Phelps-Roper* v. *Strickland*, 539 F.3d 356, 361 (6th Cir. 2008) (funerals). This broad use of the *Hill* precedent was feared at the time of *Hill*, and prompted a wide variety of groups from across the political spectrum—including the AFL-CIO, PETA, and the ACLU—to file amicus briefs asking the Court to strike down Colorado's law. PETA Amicus Br., 1999

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[11] *See, e.g.*, *Hoye*, 642 F. Supp. 2d at 1039 (relying on *McGuire I*, *McGuire II*, and this case to uphold no-approach buffer zone that applies only at abortion clinics and exempts clinic speakers); *Brown* v. *City of Pittsburgh*, 2009 WL 3489838, at *5, 8, 13 n.22 (3d Cir. Oct. 30, 2009) (relying on *McGuire I*, *McGuire II*, and this case to deem facially valid a 15 foot no-entry zone on public streets and sidewalks near Pittsburgh medical facilities with exceptions for clinic employees); *Spingola* v. *Village of Granville*, 39 Fed. Appx. 978, 984 (6th Cir. 2002) (relying on *McGuire I* and *Hill* to uphold ordinance outlawing public speaking at permitted events unless speech occurs in "designated speaking areas," deeming law facially constitutional because "there is at least one legitimate reason for the Ordinance, crowd control").

WL 1032802; AFL-CIO Amicus Br., 1999 WL 1034471; ACLU Amicus Br., 1999 WL 1045141.

The Court should grant review at least to reaffirm that *Hill* approves only a narrowly tailored accommodation of interests at the outer edge of what the First Amendment allows. *Hill* cannot be a license for legislatures to enact targeted, speaker-specific, total bans on speech in large parts of the public forum.

The First Circuit's wrenching of *Hill* to criminalize public-forum speech to willing listeners also strongly implicates the constitutional rights of women to hear and receive information and offers of alternative assistance. Although *Hill* emphasized protecting *unwilling* listeners from close approaches, many women entering clinics appreciate and take advantage of offers of help and information at a difficult time. They have a constitutional right to listen to these speakers. *See Board of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 866-867 (1982) ("[T]he Constitution protects the right to receive information and ideas."). The government has no power to make decisions about which peaceful public forum speech it does or does not wish women to hear. *See, e.g., Mosley*, 408 U.S. at 96 (government "may not select which issues are worth discussing or debating in public facilities.")

The Court should grant review to make clear that *Hill* does not countenance the broad speech restrictions in public forums that the Massachusetts law establishes. Alternatively, if *Hill* does permit such restrictions, *Hill* itself is now demonstrably unsound and should be reconsidered as being in conflict with *United States* v. *Grace*, 461 U.S. 171 (1983), *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972), and countless other First Amendment decisions, as legal commenta-

tors from across the political spectrum have concluded.[12]

II. The Decision Below Conflicts With Courts Of Appeals Decisions Concerning Public Forum Speech Restrictions

A. The Decision Below Conflicts With Other Circuits Concerning Whether And How Governments May Establish Speech-Free Buffer Zones

The First Circuit's decision conflicts directly with the en banc Ninth Circuit's application of the First Amendment in *Berger* v. *City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc). *Berger* invalidated as overbroad a rule that prohibited all visitors to the Seattle Center, "other than Center employees and licensed concessionaires, from engaging in 'speech activities' within thirty feet of a 'captive audience.' " *Id.* at 1035.

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[12] *See, e.g.*, Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 31 (2003) (*Hill* has been "condemned by progressive and conservative legal scholars alike"); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 734-738 (2001) (critiquing *Hill*'s First Amendment analysis); Colloquium, *Professor Michael W. McConnell's Response*, 28 Pepp. L. Rev. 747, 750 (2001) (quoting Laurence Tribe's description of *Hill* as "slam-dunk simple and slam-dunk wrong"); *id.* at 747-750 (quoting Prof. McConnell's critique of *Hill*); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill* v. *Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 Am. U.L. Rev. 179, 182 (2001) ("Disturbingly, the Court made it substantially easier for government entities to discriminate against disfavored viewpoints in the public forum provided that their enactments maintain the thinnest facade of neutrality.").

Like the Massachusetts law upheld by the First Circuit, the Seattle rule prohibited "both welcome and unwelcome communications, both verbal tirades and silent protests;" forbade offering a handbill to consenting individuals "in an entirely benign—even silent—manner;" and prevented even the "passive and unthreatening" display of a sign. *Id.* The court reasoned that such flat prohibitions in a 30-foot zone were fatally overbroad because they regulated much more than the specific sorts of expressive activity that might create alleged problems. *Id.*

Here, in contrast, the First Circuit upheld Massachusetts' flat prohibition on speech outside abortion clinics on the ground that it "places no burden at all on the plaintiffs' activities *outside* the 35-foot buffer zone." App. 19a (emphasis added). Had the Ninth Circuit applied that understanding of the First Amendment, it could not have invalidated the speech-free zone at issue in *Berger*. It would have been a complete answer to "Magic Mike" Berger, the street performer who brought the challenge in that case, that he could work his magic outside the buffer zone.[13]

The Eighth Circuit reached a similar result in *Phelps-Roper* v. *Nixon*, 545 F.3d 685 (8th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2865 (2009). *Phelps-Roper* held that a plaintiff was likely to succeed on the merits of a First Amendment challenge against a

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[13] In fact, the First Circuit's "ample alternative avenues" analysis below resembles the Ninth Circuit panel decision, upholding the challenged restrictions, that was vacated by the grant of en banc review. *See Berger* v. *City of Seattle*, 512 F.3d 582, 597 n.24 (9th Cir. 2008), *vacated by grant of reh'g*, 533 F.3d 1030 (9th Cir. 2008).

speech-restrictive buffer zone near funerals. The Eighth Circuit reached that conclusion because the statute, like the Massachusetts law here, did "not limit itself to activity that targets, disrupts, or is otherwise related to the funeral, memorial service or procession." *Id.* at 693.

Even the Third Circuit's recent decision in *Brown* v. *City of Pittsburgh*—which upheld a 15-foot no-entry zone outside all health care facilities, 2009 WL 3489838, at *6-8 (3d Cir. Oct. 30, 2009)—is in tension with the First Circuit's unprecedented approach. The zone approved in *Brown* was both more neutral (applying at all health care facilities) and less restrictive (15 feet instead of 35) than the law at issue here. The Third Circuit concluded that additional speech restrictions beyond that 15-foot zone (namely, a no-approach zone) were impermissible. *Id.* at *10-11. The Third Circuit was focused particularly on protecting the right to leaflet, *id.* at *10, a right the First Circuit dismissed as not "specially protected." App. 18a.

The decision below likewise conflicts with the way federal district courts have evaluated buffer zones that impose broad speech bans. *See, e.g.*, *Halfpap* v. *City of West Palm Beach*, 2006 WL 5700261, at *24 (S.D. Fla. Apr. 12, 2006) (unpublished) (rejecting 20-foot buffer zone outside medical facilities because it was "not narrowly tailored to remedy the 'evil' of confrontational or 'in your face' protesting[] ... [and u]nlike the restriction approved in *Hill*, it fails to accommodate the 'willing listener' "); *McQueary* v. *Stumbo*, 453 F. Supp. 2d 975, 995-996 (E.D. Ky. 2006) (rejecting funeral speech restriction because it did not focus on unwanted speech, but instead "prohibits activity that would not interfere with a funeral and prohibits communications that are neither necessarily unwanted nor so obtrusive that

they cannot be avoided by the funeral attendees."). *But see Hoye*, 642 F. Supp. 2d at 1039 (relying on *McGuire I* and *II* and this case to uphold buffer zone targeting abortion clinics).

B. The Decision Below Conflicts With Other Circuits Concerning Whether Complete Bans On Speech In A Particular Location Are Governed By *Hill* Or *Jews For Jesus*

The decision below also conflicts with other circuit court decisions that have addressed whether this Court's holding in *Jews for Jesus*, 482 U.S. 569, governs cases involving complete bans on speech in particular locations. Other circuits have held that the overbreadth analysis from *Jews for Jesus* does apply in such cases. The First Circuit held here that—at least after *Hill*—*Jews for Jesus* did not apply.

A law is unconstitutionally overbroad where "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (quoting *New York* v. *Ferber*, 458 U.S. 747, 769-771 (1982)). In *Jews for Jesus*, for example, this Court rejected a "First Amendment Free Zone" in the Los Angeles International Airport because, even though the airport was not a traditional public forum, the challenged speech restriction did "not merely regulate expressive activity ... that might create problems" but also "prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing." 482 U.S. at 574-75. The Court rejected the ban because, even in a nonpublic forum, no "conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575.

Other circuits therefore have recognized, when confronted with speech regulations that eliminate all speech in a particular zone, that *Jews for Jesus* is the governing precedent for such time-place-manner restrictions. *See, e.g.*, *Berger*, 569 F.3d at 1056 (applying *Jews for Jesus* to 30-foot buffer zone); *Huminski* v. *Corsones*, 396 F.3d 53, 92-93 (2d Cir. 2004) (applying *Jews for Jesus* to trespass order prohibiting subject from speaking in and around courthouse); *Parks* v. *Finan*, 385 F.3d 694, 702-703 (6th Cir. 2004) (applying *Jews for Jesus* to permit requirement governing even casual conversation and debate on state capitol grounds); *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.*, 308 F.3d 1114, 1131-1133 (10th Cir. 2002), *cert. denied sub nom.*, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *First Unitarian Church*, 539 U.S. 941 (2003) (applying *Jews for Jesus* to public easement retained after sale of portion of street to private entity). *But see Brown*, 2009 WL 3489838 (making no mention of *Jews for Jesus* and instead relying primarily on *Hill* in analyzing a no-entry zone at health care facilities).

Here, by contrast, the First Circuit declined to apply *Jews for Jesus* to a "First Amendment Free Zone," 482 U.S. at 574, on the streets and sidewalks around Massachusetts abortion clinics. The First Circuit held, in contrast to the other circuits cited above, that *Jews for Jesus* did not apply because, according to the First Circuit, this Court's decision in *Hill* "left no doubt" that time-place-manner restrictions should not be analyzed in the same way as bans on speech. App. 21a. The First Circuit's misreading of *Hill* in this regard is directly contrary to *Jews for Jesus* and the way most other circuit courts have applied that case, even after *Hill*.

CONCLUSION

Properly understood, *Hill* is a narrow decision reflecting a balance between the rights of speakers and unwilling listeners. Massachusetts has taken *Hill*, ignored all of its safeguards—applicability at a broad class of locations, equal applicability to all speakers, and applicability only to unwanted physical approaches—and used it to justify a law that is far more selective and far more restrictive of public forum speech than what the Court permitted in *Hill*. Not surprisingly, the decisions upholding Massachusetts' approach have brought the First Circuit into conflict with numerous decisions of this Court and other circuits, and have led other courts and jurisdictions to view *Hill* as similarly permissive.

The principles at stake are too important, and the ongoing chill on core protected speech too great, to leave that misreading of this Court's First Amendment precedent unreviewed and the conflicts unresolved. The Court should grant review to make clear that *Hill*, at most, marked an outer boundary, not an invitation to unequal government regulation of private speech with even consenting listeners in the public forum.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 08-2310

ELEANOR MCCULLEN ET AL.,
Plaintiffs, Appellants,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,
Defendant, Appellee.

Appeal from the United States District Court
for the District of Massachusetts
[Hon. Joseph L. Tauro, *U.S. District Judge*]

[571 F.3d 167]
July 8, 2009

Before Howard, Selya and Hansen, *Circuit Judges.*

SELYA, *Circuit Judge.* For more than three decades, those who advocate for a woman's right to choose and those who advocate for the right to life (based on a belief that life begins at the moment of conception) have struggled for advantage in the marketplace of ideas. A series of pitched battles, forming a part of this

[*] Of the Eighth Circuit, sitting by designation.

struggle, has been waged at freestanding abortion clinics, where protestors and anti-abortion counselors seek to dissuade prospective patients, shame clinic workers, and call attention to what they perceive as the evils of voluntary terminations of pregnancies. In this campaign Massachusetts has been a battleground state.

This appeal arises out of yet another skirmish in this chronicle of discord. In a very real sense, genesis of the appeal dates back to the dawning of the millennium. At that time, the Massachusetts legislature enacted a statute that created a floating buffer zone around the entrances, exits, and driveways of abortion clinics throughout the state.[1]

Given the benefit of hindsight, the legislature revised the law seven years later. The modified version of the statute replaced the floating buffer zone with a 35-foot fixed buffer zone. This appeal involves a multipronged facial challenge to the constitutionality of the modified statute.

In a thoughtful and comprehensive opinion, the district court rejected the facial challenge in all its iterations and refused to enjoin enforcement of the new law. *McCullen* v. *Coakley*, 573 F. Supp. 2d 382 (D. Mass. 2008). After careful consideration of the record, the parties' briefs, some helpful friend-of-the-court briefs, and the arguments made orally, we affirm.

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[1] The mechanics of the 2000 Act and the dimensions of the then-current buffer zone are described in earlier opinions of this court. *See McGuire* v. *Reilly*, 386 F.3d 45, 49 (1st Cir. 2004); *McGuire* v. *Reilly*, 260 F.3d 36, 40 (1st Cir. 2001).

I. BACKGROUND

In this case, as in so many cases, the past informs the present. We start there.

By the end of the twentieth century, Massachusetts had experienced repeated incidents involving violence and other unduly aggressive behaviors in the vicinity of reproductive health care facilities (RHCFs). Choosing among a host of possible preventive measures, the legislature took up a bill that proposed creating a fixed 25-foot buffer zone around the entrances, exits, and driveways of RHCFs.

The state senate held a hearing on the bill in April 1999 and received evidence of widespread harassment and intimidation outside RHCFs. Numerous witnesses addressed not only the peculiar vulnerability of women seeking abortion services but also the deleterious effects of overly aggressive demonstrations on both patient and provider safety. The senate concluded that existing laws did not adequately safeguard clinic staff, prospective patients, or members of the public.

As part of its due diligence, the senate asked the Massachusetts Supreme Judicial Court (SJC) for an advisory opinion on the constitutionality of the proposed law. The SJC discerned no constitutional impediment. *Opinion of the Justices to the Senate*, 723 N.E.2d 1, 6 (Mass. 2000).

The senate subsequently engrossed a bill intended to enhance public safety in and around RHCFs while maintaining the relatively free flow of traffic. *See* Mass. S. Jour., Feb. 29, 2000. That bill resembled the original senate bill.

Before the house of representatives could act on the senate bill, the United States Supreme Court de-

cided *Hill* v. *Colorado*, in which the Justices upheld, as a content-neutral time, place, and manner restriction, a Colorado statute designed to ameliorate the same panoply of evils through the use of a floating buffer zone. 530 U.S. 703, 707-08 (2000). The Colorado statute synthesized the fixed and floating buffer zone concepts, making it unlawful within a 100-foot fixed zone for any person, in the absence of consent, to "knowingly approach" within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Id.* at 707 (quoting Colo. Rev. Stat. § 18-9-122(3)).

The Massachusetts legislature recognized that *Hill* had shed new light on the legal landscape. Thus, the house tabled the senate bill and repaired to the drawing board. The legislature eventually enacted a law that was loosely patterned on the Colorado statute. *See* An Act Relative to Reproductive Health Care Facilities (2000 Act), S.B. 148, 181st Gen. Ct. (Mass. Aug. 10, 2000). The key component of the 2000 Act was a prohibition against knowingly approaching within six feet of another without consent for certain defined protest-related purposes. Because the prohibition only operated within an 18-foot fixed buffer zone around RHCF entrances, exits, and driveways, it mimicked the Colorado law in combining floating and fixed buffer zone concepts.

A group of Massachusetts residents who wished to protest in front of RHCFs mounted both facial and as-applied challenges to the constitutionality of the new enactment. In successive decisions, we rejected those challenges. *See McGuire* v. *Reilly* (*McGuire I*), 260 F.3d 36, 51 (1st Cir. 2001) (rejecting facial challenges); *McGuire* v. *Reilly* (*McGuire II*), 386 F.3d 45, 65-66 (1st

Cir. 2004) (rejecting renewed facial challenges as well as as-applied challenges).

Over time, legislators became concerned that the statute had failed to achieve its desired goals. In 2007, the legislature held public hearings devoted to the need for rewriting the statute. Testimony (including statements from law enforcement officials and clinic workers) revealed unanticipated difficulties in enforcing the 2000 Act and called into question that Act's efficacy. T The upshot was a decision to reshape the law by, among other things, repudiating the floating buffer zone concept and relying instead on a 35-foot fixed buffer zone.

On November 8, 2007, the legislature enacted the revised law. *See* An Act Relative to Public Safety at Reproductive Health Care Facilities (2007 Act), S.B. 1353, 185th Gen. Ct. (Mass. Nov. 13, 2007). It declares that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to [an RHCF]" within a designated buffer zone. Mass. Gen. Laws ch. 266, § 120E 1/2(b) (2007). The Act describes the new buffer zone as comprising

> a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sidelines of the street in front of such entrance, exit or driveway.

Id. Moreover, the law prohibits all persons from entering or remaining within the buffer zone during ordinary business hours, subject to exceptions for four classes of persons, namely:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

Id. Each of these exceptions derives from the 2000 Act. And the 2007 Act, like the 2000 Act, also requires that the buffer zone be clearly marked. *See id.*

On January 25, 2008, the Attorney General sent a letter to an audience that included law enforcement and RHCF personnel. The letter purports to summarize the provisions of the 2007 Act and to furnish "guidance to assist ... in applying the four exemptions." This guidance comprises four paragraphs, set forth verbatim in an appendix to this opinion.

II. TRAVEL OF THE CASE

On January 16, 2008, plaintiffs-appellants Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell, and Eric Caden, all Massachusetts residents who regularly engage in pro-life counseling outside RHCFs, sued the Attorney General of Massachusetts, in her representative capacity, in the federal district court. Their complaint invoked 42 U.S.C. § 1983, limned a constellation of constitutional claims, and prayed for declaratory and injunctive relief aimed at derailing the 2007 Act. Without objection, the dis-

trict court bifurcated the case into facial and as-applied challenges. As to the former, the court consolidated the preliminary injunction hearing with the hearing on the merits, *see* Fed. R. Civ. P. 65(a)(2), and began a bench trial on May 28, 2008.

In due season, the court issued a decision denying relief. *McCullen*, 573 F. Supp. 2d at 425. This interlocutory appeal followed. We have jurisdiction under 28 U.S.C. § 1292(a)(1).

III. ANALYSIS

We begin our odyssey by outlining the legal standards that apply generally to facial challenges and then proceed to the myriad prongs of the plaintiffs' facial challenge. Because the issues raised on appeal implicate the First Amendment, they engender de novo review. *See Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 508 (1984).

A. General Standards.

Around the edges, the standards that apply in evaluating facial challenges to the constitutionality of statutes are not entirely clear. *See* Richard H. Fallon, Jr., Commentary, *As-applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1322-23 (2000). For present purposes, though, the path is reasonably well-lighted.

The Supreme Court recently has stated that a facial challenge will fail if a statute "has a plainly legitimate sweep." *Wash. State Grange* v. *Wash. State Repub. Party*, 128 S. Ct. 1184, 1190 (2008) (citation and internal quotation marks omitted). This is a refinement of its earlier statement that a party mounting a facial challenge "must establish that no set of circumstances

exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Howsoever worded, this standard imposes a very heavy burden on a party who mounts a facial challenge to a state statute.

The statute at issue here implicates freedom of speech. Justice Cardozo long ago observed that freedom of speech is "the indispensable condition ... of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937). But even so precious a freedom must, in particular iterations, be balanced against the government's legitimate interests in protecting public health and safety. *See, e.g., Schenck* v. *United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre.") (Holmes, J.).

In striking this delicate balance, a court must calibrate the scales differently depending on the nature of the governmental action. *McGuire I*, 260 F.3d at 42. That calibration takes place along a continuum. *See Berner* v. *Delahanty*, 129 F.3d 20, 28 (1st Cir. 1997). At one end of the continuum are laws in which the government attempts to differentiate between divergent views on a singular subject; that is, laws in which the government attempts to "pick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook." *Id.* Such viewpoint-based discrimination is highly offensive to the core values of the First Amendment, and courts are wary of such encroachments. *See, e.g., Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Even when a law does not favor one particular viewpoint over another, governmental restrictions on the content of speech may be impermissible. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42

(1994). At this stage of the continuum, a reviewing court must start with a presumption that such a content-based regulation is constitutionally suspect. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383 (1992); *Nat'l Amusements, Inc.* v. *Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995). That presumption can be rebutted by a showing that the regulation is both necessary to the furtherance of a compelling state interest and narrowly tailored to the achievement of that interest. *See, e.g., Boos* v. *Barry*, 485 U.S. 312, 321 (1988).

Further along the continuum are laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur. Because such time-place-manner restrictions are by definition content-neutral, they tend to burden speech only incidentally; that is, they burden speech for reasons unrelated to either the speaker's viewpoint or the speech's content. *See Turner Broad.*, 512 U.S. at 642. Regulations of this type will be upheld as long as "they are justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). This more relaxed standard, familiarly known as "intermediate scrutiny," is justified because the fact that a regulation is both content-neutral and viewpoint-neutral helps to ensure that government is not using the regulation as a sub rosa means of interfering in areas to which First Amendment protections pertain. *See Turner Broad.*, 512 U.S. at 642.

B. Content Neutrality.

What we have said to this point leads naturally to the threshold question in this case. The district court found the 2007 Act to be content-neutral. *McCullen*, 573 F. Supp. 2d at 403. The plaintiffs demur. Because the resolution of this dispute will determine the contours of our subsequent analysis (including the appropriate level of scrutiny), we tackle this question first.

Our principal inquiry in this regard, both in speech cases generally and in time-place-manner cases specifically, "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 781. "Thus, a law designed to serve purposes unrelated to the content of protected speech is deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched." *McGuire I*, 260 F.3d at 43; *accord McGuire II*, 386 F.3d at 57.

The lower court, relying mainly on *Hill*, 530 U.S. at 719-20, determined that the 2007 Act was content-neutral because it did not regulate speech—merely the places in which speech might occur. *McCullen*, 573 F. Supp. 2d at 403. Moreover, the law was enacted in response to legitimate safety and law enforcement concerns, and was justified by those objectives without reference to the content of any speech. *Id.*

The plaintiffs resist this characterization. They acknowledge that the statute has a content-neutral patina, but they insist that this patina masks a more sinister reality. They point to several "facts" which, in their estimation, collectively indicate that the legislature's abiding motive was to curb anti-abortion speech. Specifically, the plaintiffs assert that the expanded size of the buffer zone is suspicious; that the zone itself, as re-

configured, contradicts its stated "public safety" goal in that it causes more safety hazards than it abates; that the legislature deliberately drew its evidence from biased sources, in effect listening to only one side of the story; that this court's characterizations of the 2000 Act, *McGuire I*, 260 F.3d at 49, belie the legislators' professed concerns about enforcement of that law; and that the nonexistent "emergency" referenced in the preamble to the 2007 Act is a figment of the legislators' collective imagination (and thus, a cover-up for the legislature's real agenda).

Although a few of the factual components of this broadside are new and others have been refurbished or reworked, the broadside itself is on the order of one that was leveled against the 2000 Act and soundly rebuffed in *McGuire I*. There, we wrote:

> To be sure, the plaintiffs insist that the state's professed concerns about public safety, personal security, and access to medical facilities are mere pretexts for its desire to censor anti-abortion speech. This insistence gets them nowhere. For one thing, their insinuations are unsupported by any record evidence. For another thing, where differential treatment is justified, on an objective basis, by the government's content-neutral effort to combat secondary effects, it is insufficient that a regulation may have been adopted in direct response to the negative impact of a particular form of speech.

Id. at 45. So it is here.

As in *McGuire I*, the plaintiffs' basic complaint is that alleged deficiencies in the factual record compiled by the legislature—gaps, distortions, mischaracteriza-

tions, and the like—compel an inference of pretext. But as in *McGuire I*, our independent review of the record confirms that the legislative factfinding adequately underpins what the legislature wrought. We need not cite book and verse. Although the plaintiffs, ably represented, have done a thorough job of fly-specking the legislative record, their claim of pretext is no more effective than was the counterpart claim advanced in *McGuire I*. Consequently, it is enough to note our wholehearted agreement with the district court that the record is "replete with factual references to specific incidents and patterns of problematic behavior around RHCFs." *McCullen*, 573 F. Supp. 2d at 405. In the final analysis, the claim of factual inadequacy amounts to little more than wishful thinking.

We nonetheless consider it wise to embellish two points. First, the fact that we spoke approvingly of the 2000 Act did not serve to freeze the statute in place. The legislature had a right (some might say an obligation) to monitor the statute's operation and to revisit the matter if experience revealed unexpected problems. *See Ward*, 491 U.S. at 800; *Nat'l Amusements*, 43 F.3d at 742.

Second, the test for content neutrality does not require proof that the legislature's response to a perceived problem be the only solution or even the best solution; it simply requires that the evidence support a conclusion that the regulation is in service to a legitimate governmental interest unrelated to expressive content. *McGuire II*, 386 F.3d at 58; *McGuire I*, 260 F.3d at 44. In grading a regulation's efficacy under this test, a reviewing court must grant a significant degree of respect to the legislature's judgment. *See Turner Broad.*, 520 U.S. at 195. Viewed through this deferen-

tial prism, the factfinding that undergirds the 2007 Act easily attains a passing grade.

In a related vein, the plaintiffs maintain that several features of the 2007 Act themselves constitute either content-based or viewpoint-based discrimination. These features include the exception for clinic employees and agents, the statute's alleged underinclusiveness (*i.e.*, the fact that the legislature did not extend it to other types of free-standing medical clinics), and the Attorney General's guidance letter.

This three-faceted structural argument is not original. Without exception, claims analogous to those that comprise it were addressed in our earlier decisions anent the 2000 Act. *See McGuire II*, 386 F.3d at 56-59; *McGuire I*, 260 F.3d at 44-47. Those decisions render superfluous any exegetic discussion of the current version of the structural argument. For now, it suffices to say that the mere fact that a content-neutral law has a disparate impact on particular kinds of speech is insufficient, without more, to ground an inference that the disparity results from a content-based preference. *See McGuire II*, 386 F.3d at 57; *McGuire I*, 260 F.3d at 44. Here, there is no "more."

To be sure, the plaintiffs strive to distinguish our earlier decisions and add the missing integers to the equation. Only two of these efforts deserve comment.

The argument that the law is content-based due to the exception permitting those persons associated with RHCFs (*e.g.*, clinic workers and patients) but not others to enter the buffer zone was squarely raised and squarely repulsed in *McGuire I*, 260 F.3d at 45-47. The present plaintiffs try to give that argument a new twist. They posit that the very size and nature of a 35-foot fixed buffer zone somehow changes the constitu-

tional calculus and makes this exception less defensible. This is whistling past the graveyard.

The decisive question in a facial challenge is not whether a regulation is necessary to achieve the legislature's stated goal but, rather, whether a court can glean legitimate reasons for its existence. *See id.* at 47. This principle applies to the configuration of the buffer zone selected by the legislature. The size of that zone need only be reasonably related to the attainment of the legislature's goal. That some might think a 25-foot or 30-foot buffer zone sufficient is not the issue.

Here, moreover, differences in the buffer zone's dimensions and other characteristics do not tip the constitutional balance. Regardless of those differences, the exception for persons associated with RHCFs remains reasonably related to the legislature's legitimate public safety objectives. No more is exigible to reject this aspect of the plaintiffs' facial challenge.[2]

Second, the plaintiffs maintain that the Attorney General's interpretive guidance (reprinted in the appendix) demonstrates that the 2007 Act is not content-neutral. In particular, they highlight the passage in the guidance letter in which the Attorney General uses the phrase "abortion and partisan speech." The force of this attack is dissipated by our decision in *McGuire II*, 386 F.3d at 58, in which we explained that a state official's interpretation of a statute, even if generally au-

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[2] This same reasoning also serves to defeat the plaintiffs' equal protection and viewpoint discrimination claims, each of which focuses on the legislature's decision to limit the reach of the relevant exception to persons associated with RHCFs.

thoritative, cannot render an otherwise constitutional statute vulnerable to a facial challenge.

In sum, we find nothing in either the text or the legislative history of the 2007 Act that deprives that statute of content-neutral status. We proceed, therefore, with intermediate scrutiny, recognizing that the constitutionality of the 2007 Act turns on whether it is narrowly tailored and allows sufficient alternative means of communication. *See, e.g., Clark*, 468 U.S. at 293.

C. Narrow Tailoring/Channels of Communication.

A regulation is narrowly tailored if it (i) facilitates a substantial governmental interest that would be less effectively served without the regulation and (ii) accomplishes this end without burdening substantially more speech than necessary. *Ward*, 491 U.S. at 799.

The first element of this two-part definition is not seriously disputed here. The interests ascribed by the legislature to the 2007 Act (enhancing public safety around RHCFs, improving traffic flow, and the like) are the same as those that we deemed both proper and substantial in *McGuire I*, 260 F.3d at 48 (describing those interests as "precisely the sort of interests that justify some incidental burdening of First Amendment rights").

It is the second part of the definition that draws the plaintiffs' fire: they argue that the 2007 Act regulates too much speech. But this argument rests on a misconception; it assumes that, in order to survive intermediate scrutiny, a law (and within a law, a buffer zone) must burden no more speech than is absolutely necessary to accomplish the law's legitimate purpose.

Perscrutation of the plaintiffs' briefs makes it apparent that this misconception arises out of a misreading of the Court's decisions in *Schenck* v. *Pro-Choice Network, Inc.*, 519 U.S. 357 (1997), and *Madsen* v. *Women's Health Center*, 512 U.S. 753 (1994). In each instance, the Court applied a "no greater restriction than necessary" standard to determine the validity of an injunction. *See Schenck*, 519 U.S. at 374; *Madsen*, 512 U.S. at 765. But injunctions (which bind only the parties in a particular case and those in privity with them) are more targeted than statutes (which apply broadly to all concerned). This is a critically important distinction; the Court has made it pellucid that the absence of general applicability subjects injunctions to a stricter standard than legislative enactments. *See Madsen*, 512 U.S. at 764-65; *cf. Ry. Exp. Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.") (Jackson, J., concurring). A law of general application passes muster under narrow tailoring principles as long as it is not substantially broader than necessary to accomplish the legislature's legitimate goal. *See Ward*, 491 U.S. at 799; *see also Madsen*, 512 U.S. at 764.

Ward supplies the measuring stick that we must wield. The 2007 Act is a law of general application. Given that it promotes a substantial public interest, *McGuire I*, 260 F.3d at 48, the decisive question is whether it burdens *substantially* more speech than necessary to serve that purpose. If the answer to that query is in the negative, the law does not offend the First Amendment "simply because a court concludes that the government's interest could be adequately

served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800. This means, of course, that "a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted" are not conditions precedent to upholding a time-place-manner restriction. *Id.*

That conclusion effectively ends this aspect of the matter. Testimony from law enforcement officers and clinic workers attested to the ineffectiveness of the preexisting law. Against that backdrop, the legislature determined, after considerable study, that the state's declared interests would be better served by reconfiguring the buffer zone around RHCFs. The legislature labored to balance First Amendment concerns with public safety concerns, *see McCullen*, 573 F. Supp. 2d at 397-98 (recounting evidence), mulled the advantages and disadvantages of variously configured buffer zones, and decided (reasonably, we think) that a 35-foot fixed buffer zone made sense. Given the deference that is owed to such legislative judgments, *see Turner Broad.*, 520 U.S. at 195, we cannot say that the 2007 Act is substantially broader than necessary.

The fact that the legislature reached a different conclusion seven years earlier (when it preferred a smaller buffer zone that had both floating and fixed components) does not undercut this conclusion. After all, legislative choice is a dynamic process. Simply because a legislature previously has attempted to address a particular problem in one way does not disable it from taking a different approach at a later time. *See, e.g.*, *Ward*, 491 U.S. at 800 (justifying increased regulation based on evidence of inadequacy of municipality's prior attempts to combat noise); *Nat'l Amusements*, 43 F.3d

at 742 n.9 (similar); *cf. Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (affirming agency's reversal of position while noting that in exercising legislatively delegated authority agency is free to consider "the wisdom of its policy on a continuing basis"). Experience is often the best teacher, and the incremental nature of the legislature's actions seems more a virtue than a vice. On these facts, the legislature's judgment must be respected. *See Turner Broad.*, 520 U.S. at 195.

Relatedly, the plaintiffs suggest that the 2007 Act is constitutionally infirm because it amounts to a ban on handbilling and interferes with the provision of an eight-to-fifteen-foot "constitutional conversational distance." That suggestion is jejune.

Contrary to the plaintiffs' importunings, the Constitution neither recognizes nor gives special protection to any particular conversational distance. *See, e.g., Schenck*, 519 U.S. at 380 (upholding a fixed 15-foot buffer zone). By the same token, handbilling is not specially protected. *See Heffron* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981). Time-place-manner regulations routinely make particular forms of expression impracticable without raising constitutional concerns. *See, e.g., Hill*, 530 U.S. at 726-28. As we explained in *Bl(a)ck Tea Society* v. *City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004), there is no constitutional guarantee of any particular form or mode of expression. The correct inquiry is whether, in light of the totality of the circumstances, a time-place-manner regulation burdens substantially more speech than necessary and, concomitantly, whether such a regulation leaves open adequate alternative channels of communication. *See Clark*, 468 U.S. at 293.

This brings us to the question of whether the 2007 Act satisfies the last half of this prescription—the half that deals with alternative channels of communication. To begin, the 2007 Act places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone. They can speak, gesticulate, wear screen-printed T-shirts, display signs, use loudspeakers, and engage in the whole gamut of lawful expressive activities. Those messages may be seen and heard by individuals entering, departing, or within the buffer zone.

Additionally, the plaintiffs may stand on the sidewalk and offer either literature or spoken advice to pedestrians, including those headed into or out of the buffer zone. Any willing listener is at liberty to leave the zone, approach those outside it, and request more information.

To cinch matters, the size of the zone is not unreasonable. It bears repeating at this point that we are dealing exclusively with a facial challenge to the 2007 Act. Thus, as long as we can envision circumstances in which a 35-foot buffer zone allows adequate alternative means of expression, the challenge must fail. *See Wash. State Grange*, 128 S. Ct. at 1190.

It is easy to envision such a scenario. Indeed, the zone at issue here is slightly smaller than that upheld in *Madsen*, 512 U.S. at 768-70 (validating a 36-foot buffer zone under a standard stricter than that which is applicable here). By like token, the zone at issue here is substantially smaller than the fixed portion of the buffer zone approved in *Hill*, 530 U.S. at 703 (upholding a floating buffer zone within a 100-foot fixed buffer zone). Also instructive is *Burson* v. *Freeman*, 504 U.S. 191 (1992), in which the Court, applying strict scrutiny to a content-based regulation, approved a 100-foot

buffer zone for polling places. *Id.* at 211. While there is no particular buffer zone radius that is per se permissible or impermissible—everything depends on context—the radius here is not, on its face, constitutionally deficient.

To say more on the binary question of narrow tailoring and alternative channels of communication would be supererogatory. In the circumstances revealed by the record, the 2007 Act, on its face, is a valid time-place-manner regulation that advances a significant governmental interest without burdening substantially more speech than necessary and leaves open adequate alternative channels of communication. Accordingly, the statute survives intermediate scrutiny.

D. Overbreadth.

First Amendment challenges based on a statute's alleged overbreadth are more readily accommodated than other types of facial challenges. The main difference is that courts will consider overbreadth challenges even though the challenger's own free speech rights are not implicated. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). This leniency results from a judicial "assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* The plaintiffs mount such a challenge. They argue that the 2007 Act cannot constitutionally be applied to the wide universe of people who might want to linger in the buffer zone and express their views. They liken this case to *Board of Airport Commissioners* v. *Jews For Jesus*, in which the Supreme Court struck down as overbroad an outright ban on all First Amendment activity within a major international airport. 482 U.S. 569, 577 (1987).

The matter at hand is readily distinguishable from *Jews for Jesus*. That case involved a direct ban on First Amendment activity, whereas this case involves a time, place, and manner restriction. The Court has left no doubt but that time-place-manner restrictions should not be analyzed in the same way as direct bans on speech. *See Hill*, 530 U.S. at 731.

In all events, the plaintiffs' overbreadth argument is eerily reminiscent of one considered and rejected in *Hill*. There, the challengers asserted that the Colorado statute was overbroad because it applied to all medical clinics, not just to abortion providers. The Court debunked that assertion, stating that "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." *Id.* at 730-31; *see id.* at 723 (approvingly noting that the statute applies "equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries").

That logic is persuasive here. Although the Massachusetts legislature was plainly moved to enact the statute by the secondary effects of anti-abortion protests, it opted to address the secondary effects of a broader range of activities in the interest of effective enforcement. This decision to widen the statute's coverage is a matter of degree, not a matter of kind. Legislatures are not held to standards of mathematical precision where policy judgments are concerned. *See, e.g.*, *Burson*, 504 U.S. at 210 (describing the question of whether a 100-foot buffer zone could be reduced by 25 feet as not of "constitutional dimension"). Here, the increased degree of the expansion is reasonable, so the expansion is not a matter of constitutional significance. *See Hill*, 530 U.S. at 730-31; *Burson*, 504 U.S. at 210; *see also City Council of Los Angeles* v. *Taxpayers for*

Vincent, 466 U.S. 789, 802 (1984) (explaining that "if the ordinance may be validly applied to [the plaintiffs], it can be validly applied to [a broader range of persons]").

There is, moreover, a paradox that taints the plaintiffs' overbreadth argument. The plaintiffs say, in effect, that the 2007 Act should have been limited to abortion-related speech. Yet the absence of any reference to any particular kind of speech (and, thus, to any particular content or viewpoint) is what makes the statute content-neutral. *See Hill*, 530 U.S. at 723; *Burson*, 504 U.S. at 207. If a failure to distinguish among speakers in itself gave rise to overbreadth problems, legislatures would be forced to choose between passing laws that were not content-neutral or laws that were overbroad. *Hill* pretermits the contention that the First Amendment forces state legislatures to face this sort of Morton's Fork.

We have yet another bridge to cross. At oral argument in this court, the plaintiffs essayed a new and different spin on overbreadth—a perspective that emerged during the panel's questioning. Seizing upon this perspective, the plaintiffs suggested that the Attorney General's guidance letter might be read to criminalize the conduct of anyone who engages in any "partisan speech," whether or not abortion-related, while passing though the buffer zone. This interpretation raises the concern that an individual could be prosecuted merely for passing through the buffer zone en route to a destination outside the zone while, say, wearing a lapel pin advocating the election of a political candidate or a T-shirt exhorting a favorite baseball team.

Though interesting, this argument is untimely. It was not raised either in the district court or in the

plaintiffs' briefs on appeal.[3] It is, therefore, waived. *See United States* v. *Slade*, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals."); *Anderson* v. *Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir. 1990) (holding that an appellant's briefs fix the scope of the issues appealed and that, therefore, an appellant cannot breathe life into an omitted theory merely by referring to it at oral argument). That the court inquired about the theory at oral argument does not lower this bar.

We add a coda. Were we to reach the merits of this argument—which we do not—the proper resolution of it is not obvious. The Supreme Court has cautioned that "[t]he overbreadth doctrine is strong medicine that is used sparingly and only as a last resort." *N.Y. State Club Ass'n* v. *City of New York*, 487 U.S. 1, 15 (1988). Thus, a court may overturn a law as overbroad only if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange*, 128 S. Ct. at 1191 n.6. Courts must "vigorously enforce" this sub-

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[3] To be sure, the plaintiffs' general overbreadth argument implicitly attacks the exceptions to the 2007 Act. But avoiding waiver requires more than a hint that a particular theory may be lurking; it necessitates some developed argumentation addressed to that particular theory. *See United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990).

The plaintiffs also argued below that the legislature's use of the word "solely" in the statutory text rendered the statute unconstitutionally vague. *See McCullen*, 573 F. Supp. 2d at 421. Although their newly minted argument likewise involves, in part, the statute's use of the word "solely," it is a conceptually different argument.

stantiality requirement. *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008). In this case, it seems likely that the alleged overbreadth is not sufficiently sprawling to serve as the foundation for a constitutional challenge.

E. Vagueness.

The plaintiffs contend that the Attorney General's guidance letter renders the 2007 Act void for vagueness because it uses the term "partisan speech"—a term that is allegedly so amorphous "that persons of average intelligence would have no choice but to guess at its meaning and modes of application." *United States* v. *Hussein*, 351 F.3d 9, 14 (1st Cir. 2003). We reject this contention.

The Due Process Clause forbids the sovereign from depriving an individual of liberty pursuant to an excessively vague law. *See id.*; *United States* v. *Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994). This doctrine prevents the enforcement of laws that fail to give persons of ordinary intelligence a reasonable opportunity to know what conduct is proscribed and what is not. *Hill*, 530 U.S. at 732; *Hussein*, 351 F.3d at 14. The Due Process Clause also forbids laws that impermissibly delegate basic policy matters to adjudicators for resolution on an ad hoc or largely subjective basis, thus threatening arbitrary and discriminatory application. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

In the district court, the plaintiffs alleged that the 2007 Act was impermissibly vague because of the uncertainty inherent in the terms "solely" and "destination." *See McCullen*, 573 F. Supp. 2d at 421. They also argued that the term "partisan speech," provided as a gloss in the Attorney General's guidance letter (re-

printed in the appendix), rendered the statute vague. *Id.* In this venue, the plaintiffs address only the term "partisan speech," a phrase found exclusively in the guidance letter.

When confronting a vagueness challenge to the face of a state statute, we are obliged to accept any limiting construction that a state agency has authoritatively proffered. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982). It is difficult to understand, however, how or why a challenger can mount a facial attack on a statute that is itself not vague simply because an enforcement official has offered an interpretation of the statute that may pose problems down the road. *See McGuire II*, 386 F.3d at 58; *see also Grayned*, 408 U.S. at 108-09. As a matter of logic, we do not believe that an official's interpretation can render clear statutory language vague so as to make the statute vulnerable to a facial (as opposed to an as-applied) attack.[4] *See McGuire II*, 386 F.3d at 58; *see also United States* v. *Protex Indus.*, Inc., 874 F.2d 740, 743 (10th Cir. 1989) (noting that a statute can be void for vagueness, as applied, as a result of a retroactive expansion of precise statutory language through interpretation).

Even were we to assume arguendo that the plaintiffs' underlying point is that the statute itself is vague and that this lack of precision is exacerbated by the Attorney General's guidance letter, another obstacle would loom. Although the word "partisan" may be vague at the margins, *but see Broadrick*, 413 U.S. at

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[4] The situation may well be different if the statute itself is vague or ambiguous—but that is not the premise of the vagueness argument that the plaintiffs are making here.

608, that uncertainty would have no relevance here. After all, the plaintiffs, by their own admission, want to engage in anti-abortion protests; and that conduct, as they must know, falls squarely within the hard core of the proscriptions spelled out in the guidance letter.

We need go no further. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974); *see Broadrick*, 413 U.S. at 608. That is precisely the situation here.

F. Prior Restraint.

We need not linger long over the plaintiffs' claim that the 2007 Act constitutes an impermissible prior restraint on speech. The case law makes manifest that time-place-manner restrictions are analyzed under intermediate scrutiny and not under the more rigorous standard that applies to prior restraints. *See, e.g.*, *Bl(a)ck Tea Soc'y*, 378 F.3d at 12. Consequently, our determination that the 2007 Act is a valid time-place-manner restriction effectively forecloses the plaintiffs' resort to case law involving prior restraints. *See id.* ("If content-neutral prohibitions on speech at certain places were deemed prior restraints, the intermediate standard of review prescribed in the time-place-manner jurisprudence would be eviscerated.").

IV. CONCLUSION

To recapitulate, the 2007 Act represents a permissible response by the Massachusetts legislature to what it reasonably perceived as a significant threat to public safety. It is content-neutral, narrowly tailored, and leaves open ample alternative channels of communication. It is, therefore, a valid time-place-manner regulation, and constitutional on its face.

We add a caveat. This decision flows naturally from the very heavy burden that plaintiffs must carry in mounting a facial challenge to a state statute. Nothing that we have said forecloses the possibility that, on a better-developed record, this legislative solution may prove problematic in particular applications.

Affirmed.

APPENDIX I: THE ATTORNEY GENERAL'S GUIDANCE.

The first exemption—for persons entering or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic. It does not permit companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose.

The second exemption—for employees or agents of the clinic acting within the scope of their employment—allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone.

Similarly, the third exemption—for municipal employees or agents acting within the scope of their employment—does not allow municipal agents to express their views about abortion or to engage in any other partisan speech within the buffer zone.

Finally, the fourth exemption—for persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic—applies to individuals who are crossing through the buffer zone, without

stopping, to go somewhere other than a location within the zone and other than the clinic, and who are not using the buffer zone for some other purpose while passing through. For example, an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 08-10066-JLT

ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY A. SMITH, CARMEL FARRELL, AND ERIC CADIN,

Plaintiffs,

v.

MARTHA COAKLEY, in her capacity as Attorney General for the Commonwealth of Massachusetts,

Defendant.

[573 F. Supp. 2d 382]
August 22, 2008

MEMORANDUM

TAURO, J.

Introduction

Plaintiffs challenge the facial constitutionality of a recently revised Massachusetts statute, Mass. Gen. Laws ch. 266, § 120E1/2 ("Act"), which establishes a 35-foot fixed buffer zone around driveways and entrances of reproductive health care facilities ("RHCFs").[1] Fol-

[1] An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)) (Trial Ex.

lowing a Bench Trial held on May 28, 2008, this court finds that the Act survives First Amendment, Equal Protection and Due Process challenges.

Background

A. The Parties

Plaintiffs Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell and Eric Cadin are Massachusetts residents who regularly engage in pro-life counseling outside RHCFs.[2] Defendant Attorney General Martha Coakley is the chief lawyer and law enforcement officer of the Commonwealth of Massachusetts. As such, Attorney General Coakley bears responsibility for enforcing the Act. She is sued in her official capacity only.[3]

B. Procedural History

On January 16, 2008, Plaintiffs filed the Complaint, advancing eight counts under 42 U.S.C. § 1983: (1) Free Speech—Time, Place and Manner; (2) Free Speech—Substantial Overbreadth; (3) Free Speech—Prior Restraint; (4) "Free Speech—Free Association—Free Exercise Hybrid;" (5) Free Speech—Viewpoint Dis-

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1) [#36]. The Act revised parts of Mass. Gen. Laws ch. 266, § 120E1/2 (2000) (Trial Ex. 3) [#38]

[2] *See* Decl. of Eleanor McCullen (Trial Ex. 4) [#39]; Decl. of Jean Blackburn Zarrella (Trial Ex. 5) [#40]; Decl. of Carmel Farrell (Trial Ex. 6) [#41]; Decl. of Eric Cadin (Trial Ex. 7) [#42]; Decl. of Gregory A. Smith (Trial Ex. 8) [#43].

[3] *See* Compl. at 3 [#1].

crimination; (6) Due Process—Vagueness; (7) Due Process—Liberty Interest; and (8) Equal Protection.[4]

Plaintiffs seek that this court: (1) declare that the Act is unconstitutional on its face; (2) declare that the Act is unconstitutional as applied at the Allston-Brighton Planned Parenthood and Women's Health Service; (3) preliminarily[5] and permanently enjoin Defendant from enforcing the Act; (4) award costs and attorneys fees; and (5) grant any other relief that this court deems necessary and proper.[6]

Following Defendant's Answer, and briefing on Plaintiffs' preliminary injunction motion, this court held a Case Management Conference on April 23, 2008. Without objection from the Parties, this court ordered that the matter proceed on the merits in two stages:[7] (1) a Bench Trial on Plaintiffs' facial challenge; and (2) a Bench Trial on Plaintiffs' as-applied challenge.[8]

In early May 2008, the Parties stipulated to the content of the Trial Record for the facial challenge,[9] and filed a Joint Trial Record with this court.[10] On May 14,

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[4] *See id.* at 13-22 [#1].

[5] Pls.' *Mot. for Prelim. Inj.* [#2].

[6] *See* Compl. at 22-23.

[7] This court denied Plaintiffs' *Motion for Preliminary Injunction* without prejudice to re-raising similar issues in a Bench Trial on the merits. *See* Order [#34].

[8] *See id.*

[9] *See* Joint Stipulation as to the Content of the Trial R. for the Bench Trial of Pls.' Facial Challenge [#35].

[10] *See* Trial Exs. 1-29 [Docket Nos. 36-66].

2008, the Parties filed Proposed Findings of Fact and Conclusions of Law.[11] Also on May 14, 2008, four individuals filed an Amicus Brief in support of Plaintiffs' facial and as-applied challenges.[12]

On May 28, 2008, this court held a Bench Trial on Plaintiffs' facial challenge. The Parties presented extensive oral argument, and this court took the matter under advisement.[13]

Factual Findings

A. Notes on Factual Findings

1. Source

The following findings of fact derive from the Joint Trial Record submitted by the Parties. Additionally, this court takes notice of the findings of the First Circuit with respect to the legislative justification for the original statute enacted in 2000 ("2000 Act").[14]

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[11] *See* Pls.' Proposed Findings of Fact and Conclusions of Law [#69] ("PFF"); Def.'s Proposed Findings of Fact and Conclusions of Law [#70] ("DFF").

[12] Mem. of Amicae Curiae [#71].

[13] On June 3, 2008, Plaintiffs filed a *Motion for Leave to File Post-Argument Brief on the Trial of Facial Challenge* [#72], which Defendant opposed. *See* Opp'n to Pls.' Mot. for Leave to File a Post-Trial Brief [#73]. This court denied Plaintiffs' motion. *See* Electronic Order dated June 5, 2008. On June 16, 2008, this court received a preliminary copy of the Bench Trial Transcript ("Prelim. Bench Trial Transcript").

[14] *See McGuire v. Reilly*, 260 F.3d 36, 39-41 (1st Cir. 2001) ("*McGuire I*"); *McGuire v. Reilly*, 386 F.3d 45, 48-49 (1st Cir.2004) ("*McGuire II*"). *See also, e.g., Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 456 n. 9 (1st Cir. 2000) ("The Rules of Evidence state that the court may take judi-

2. Focus on Facial Challenge

Plaintiffs urge this court to adopt various findings of fact relating to, among other things, the following: Plaintiffs' activities at certain RHCFs; specific incidents at certain RHCFs; and the operation of the buffer zone at certain RHCFs.[15] Additionally, Defendant asks this court to adopt certain findings of fact relating to the effects of the Act, to date, at certain RHCFs.[16] While this information may be important to Plaintiffs' as-applied challenge, it is largely irrelevant to the facial challenge. Moreover, because the as-applied challenge will be tried separately, this court does not have a complete record from which to make such findings.

B. History of the 2000 Act

As noted by the First Circuit, "[b]y the late 1990s, Massachusetts had experienced repeated incidents of

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cial notice of legislative facts whether requested or not. *See* Fed. R. Evid. 201(c). A 'legislative fact' is defined as 'one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)."); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 172 F.3d 104, 112 (1st Cir.1999) ("[S]o-called 'legislative facts,' which go to the justification for a statute, usually are not proved through trial evidence but rather by material set forth in the briefs, the ordinary limits on judicial notice having no application to legislative facts.") (citing Fed. R. Evid. 201 advisory committee's note; *Knight v. Dugger*, 863 F.2d 705, 742 (11th Cir.1988)).

[15] *See* PFF at 2-10.

[16] *See* DFF at 16-18.

violence and aggressive behavior outside RHCFs."[17] These included a shooting that occurred on December 30, 1994, in which two people were killed and several others injured.[18] Massachusetts courts also issued numerous injunctions prohibiting certain individuals from engaging in violent, harassing or intimidating activity at RHCFs.[19]

Responding to these concerns, "the Massachusetts legislature, confronted with an apparently serious public safety problem, investigated the matter thoroughly."[20] "That investigation yielded solid evidence that abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave RHCFs."[21]

Part of the investigation included a state senate hearing on the matter in April of 1999.[22] At the hearing, the "received testimony chronicled the harassment and intimidation that typically occurred outside

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[17] *McGuire I*, 260 F.3d at 38.

[18] *See id.* at App. B.

[19] *See, e.g., Planned Parenthood League of Mass., Inc. v. Bell*, 677 N.E.2d 204 (1997); *Commonwealth v. Filos*, 649 N.E.2d 1085 (1995); *Planned Parenthood League of Mass., Inc. v. Blake*, 631 N.E.2d 985 (1994); *Commonwealth v. Cotter*, 612 N.E.2d 1145 (1993); *Commonwealth v. Brogan*, 612 N.E.2d 656 (1993); *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 550 N.E.2d 1361 (1990); *Commonwealth v. Manning*, 673 N.E.2d 73 (1996).

[20] *McGuire I*, 260 F.3d at 44.

[21] *Id.*

[22] *Id.* at 39.

RHCFs."[23] In addition, "numerous witnesses addressed the emotional and physical vulnerability of women seeking to avail themselves of abortion services, and gave accounts of the deleterious effects of overly aggressive demonstrations on patients and providers alike."[24]

The senate, "[b]ased in part on this testimony, ... concluded that existing laws did not adequately protect public safety in areas surrounding RHCFs," and the Legislature began considering new laws to address the problem.[25] Initially, in Senate Bill 148, the senate considered a 25-foot fixed buffer zone around RHCF entrances and driveways. The First Circuit explained:

> To remedy this situation, the senate favored the creation of fixed buffer zones. The sponsors of the bill left no doubt that they intended the proposed law to "increase public safety in and around [RHCFs]" while "maintaining the flow of traffic and preventing congestion" there. S.B. 148 ... § 1. In the bargain, the sponsors expected the law to provide "reasonable time, place and manner restrictions to reconcile and protect both the First Amendment rights of persons to express their views near reproductive health care facilities and the rights of persons seeking access to those facili-

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[23] *Id.* For copies of the written testimony received by the senate, see Exhibits A-F to the Affidavit of Richard A. Powell (Trial Ex. 29) [#66-2-7]. The testimony includes numerous specific observations and incidents.

[24] *Id.*

[25] *Id.*

> ties to be free from hindrance, harassment, intimidation and harm." It thereby would "create an environment in and around reproductive health care facilities which is conducive towards the provision of safe and effective medical services ... to its patients." *Id.*
>
> Skeptics worried that the proposed law might offend the Constitution. To stave off these gloom-and-doom predictions, the senate, on November 3, 1999, asked the Massachusetts Supreme Judicial Court (SJC) for an advisory opinion on the bill's constitutionality.
>
> On January 24, 2000, the SJC concluded that the Constitution presented no obstacle to enactment. *Opinion of the Justices to the Senate*, 430 Mass. 1205, 1211-12, 723 N.E.2d 1 (2000). The SJC advised that the bill, as framed, was unrelated to the content of protected expression. *Id.* at 1209. Moreover, the restrictions imposed had a rational basis in view of the heightened governmental interest that arises when "advocates of both sides of one of the nation's most divisive issues frequently meet within close proximity of each other in the areas immediately surrounding the State's clinics, in what can and often do become congested areas charged with anger." *Id.* at 1210.[26]

Following the SJC's opinion, the state senate adopted the bill on February 29, 2000.[27] On June 28,

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[26] *Id.* at 39-40 (spacing modified).

[27] *Id.* at 40.

2000, however, the Supreme Court decided *Hill v. Colorado*.[28] There, the Court considered the constitutionality of a Colorado statute that regulated speech-related conduct around RHCFs.[29] The statute created a "floating" buffer zone within a 100-foot "fixed" buffer zone.[30] Plaintiffs challenged the "floating" zone, which "ma[de] it unlawful within the regulated areas for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person....' "[31]

The Court upheld the Colorado statute as a valid time, place and manner regulation, finding that the law was "narrowly tailored" and "serve[d] governmental interests that are significant and legitimate and that the restrictions are content neutral."[32] This court will address *Hill* in more detail below.

C. The 2000 Act[33]

Subsequently, the Massachusetts Legislature decided to follow the Court-approved Colorado model of a

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[28] 530 U.S. 703 (2000).

[29] *See id.* at 707.

[30] *See id.*

[31] *Id.*

[32] *Id.* at 725-26.

[33] Judge Harrington, at the trial level, and the First Circuit on appeal, have adjudicated the constitutionality of the 2000 Act, and much of the information in this section draws from their discussions in the *McGuire* line of cases.

"floating" buffer zone within a "fixed" buffer zone. The state house redrafted Senate Bill 148 accordingly, and on July 28, 2000, adopted an Act Relative to Reproductive Health Care Facilities, Chapter 217 of the Acts of 2000 ("2000 Act").[34] The senate approved on July 29, 2000, and Governor Celluci signed the bill on August 10, 2000.[35]

The 2000 Act created an 18-foot fixed buffer zone around RHCFs, within which a 6-foot floating buffer zone existed around any person or occupied motor vehicle:

> (b) No person shall knowingly approach another person or occupied motor vehicle within six feet of such person or vehicle, unless such other person or occupant of the vehicle consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk area within a radius of 18 feet from any entrance door or driveway to a reproductive health care facility or within the area within a rectangle not greater than six feet in width created by extending the outside boundaries of any entrance door or driveway to a reproductive health care facility at a right angle and in straight lines to the point where such lines in-

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[34] *See McGuire I*, 260 F.3d at 40; Mass. Gen. Laws ch. 266, § 120E1/2 (2000) (Trial Ex. 3).

[35] *See McGuire I*, 260 F.3d at 40; Mass. Gen. Laws ch. 266, § 120E1/2 (2000) (Trial Ex. 3).

> tersect the sideline of the street in front of such entrance door or driveway.[36]

The 2000 Act, however, exempted certain groups from its coverage:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.[37]

Additionally, the provisions of the 2000 Act were only in "effect during a facility's business hours and [only] if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted."[38]

D. Attorney General's Guidance on the 2000 Act

On November 10, 2000, the Massachusetts Attorney General's office sent a letter to the Brookline and Boston police departments regarding the 2000 Act.[39]

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[36] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000) (Trial Ex. 3).

[37] *Id.*

[38] *Id.* § 120E1/2(2)(c).

[39] *See McGuire II*, 386 F.3d at 52.

The letter explained the Attorney General's interpretation of the exemption for "employees or agents of such facility acting within the scope of their employment,"[40] and "noted that if escorts were to approach within six feet of a woman within the fixed buffer zone in order to 'hurl[] epithets at demonstrators,' then their actions would not be within the scope of their employment and they would not be protected by the exemption."[41]

On May 23, 2001, members of the Attorney General's office met with staff from the Planned Parenthood League of Massachusetts, "to communicate the Attorney General's interpretation that the Act's exemption for clinic employees and agents acting within the scope of their employment would not protect such persons if they were to use the exemption to engage in counter-protests, counter-education, or counter-counseling against anti-abortion views, rather than simply assisting the patients into the clinic and protecting clinic access."[42]

On February 14, 2003, an assistant attorney general issued a letter to the police departments with RHCFs affected by the 2000 Act.[43] The letter reiter-

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[40] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000) (Trial Ex. 3).

[41] *McGuire II*, 386 F.3d at 52.

[42] *Id.* Also during July of 2001, the Attorney General's office provided training consistent with its November 10, 2001 guidance letter to the Boston and Brookline police departments. *Id.*

[43] *McGuire v. Reilly*, 271 F. Supp. 2d 335, 339 (D. Mass. 2003) (Harrington, J.), *aff'd*, *McGuire II*, 386 F.3d 45 (1st Cir. 2004). Hereinafter, this court will refer to the letter as the "2003 Guidance Letter."

ated that " 'all persons in the restricted area, including clinic employees and agents, are subject to the restrictions in Section 120E 1/2(b) of the Act, including the restriction on oral protest, education, or counseling[,]' and that clinic employees and agents may not use the exemption to 'express their views about abortion[.]' "[44] As noted by the First Circuit, this letter "did not signify a new interpretation; it was merely a restatement of an old position. In this most recent clarification of the interpretation, the Attorney General has clearly construed the exemption to exclude pro-abortion or partisan speech from the term 'scope of their employment.' "[45]

E. *McGuire I* and *McGuire II*

Three pro-life "sidewalk counselors"[46] challenged the facial and as-applied constitutionality of the 2000 Act in a federal lawsuit in this District. Judge Harrington found that the statute—on its face—violated the First Amendment, and preliminarily enjoined its enforcement pending a hearing on the merits.[47]

In *McGuire v. Reilly* ("*McGuire I*"), the First Circuit reversed, holding that the statute lawfully regulated the time, place and manner of speech without discriminating based on content or viewpoint, and re-

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[44] *Id.* at 339-40.

[45] *McGuire II*, 386 F.3d at 52 n.1.

[46] *Id.* at 48.

[47] *See McGuire v. Reilly*, 122 F. Supp. 2d 97 (D. Mass. 2000) (Harrington, J.), *rev'd*, *McGuire I*, 260 F.3d 36 (1st Cir. 2001).

manded the case to the district court for further proceedings.[48]

On remand, the plaintiffs pressed facial and as-applied challenges on the merits. Based on the First Circuit's decision in *McGuire I*, Judge Harrington granted Defendants summary judgment on Plaintiffs' facial challenge,[49] but denied summary judgment on the as-applied challenge pending additional discovery and the filing of a renewed motion for summary judgment.[50]

After additional discovery, Judge Harrington granted Defendants summary judgment on the as-applied challenge.[51] On the issue of enforcement following *McGuire I*, Judge Harrington found that "the Act has since been interpreted by the Attorney General so as to require evenhanded enforcement of its prohibitions, even against clinic employees and agents, and the Attorney General's interpretation has been adopted by the law enforcement authorities."[52]

In *McGuire v. Reilly* ("*McGuire II*"), the First Circuit affirmed summary judgment on both the facial and as-applied challenges.[53] *McGuire I* controlled the facial challenge, and the plaintiffs "offered no reason why the

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[48] *See McGuire I*, 260 F.3d 36.

[49] *See McGuire v. Reilly*, 230 F. Supp. 2d 189, 193 n.10 (D. Mass. 2002) (Harrington, J.).

[50] *Id.* at 194.

[51] *See McGuire v. Reilly*, 271 F. Supp. 2d 335 (D. Mass. 2003) (Harrington, J.), *aff'd*, *McGuire II*, 386 F.3d 45 (1st Cir. 2004).

[52] *Id.* at 341.

[53] *See McGuire II*, 386 F.3d 45.

conclusion reached in *McGuire I* ... is flawed."[54] Additionally, the court concurred with Judge Harrington's assessment of the Commonwealth's enforcement position, holding that "[t]he Attorney General's interpretation ... is important for our purposes ... because it is clearly a proper, content-neutral way of interpreting the exemption."[55] With respect to the as-applied challenge, the court concluded that "there is no evidence that the police have enforced this statute in anything other than an evenhanded way...."[56]

F. The Legislature Determines that the Statute Needs to be Revised

1. Proposed Senate Bill 1353

Following the passage and operation of the 2000 Act, members of the Legislature became aware of continued and serious public safety problems in the areas adjacent to RHCF entrances and driveways, including significant concerns regarding safe patient access to medical services.[57]

In 2007, responding to these concerns, several members of the Legislature introduced Senate Bill 1353, "An Act Relative to Public Safety." The proposed preamble read:

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[54] *Id.* at 59.

[55] *Id.* at 64.

[56] *Id.* at 65.

[57] *See, e.g.*, Hearing Transcript at 7-13 (legislators—including some of the bill's sponsors—discussing public safety concerns at RHCFs, problems with the 2000 Act, and the origins of Senate Bill 1353).

> Whereas preservation of public safety is a fundamental obligation of state government;
>
> Whereas pedestrians have a right to travel peacefully on Massachusetts streets and sidewalks; and
>
> Whereas clearly defined boundaries improve the ability of safety officials to protect the public;[58]

The bill modified the size and nature of the buffer zone:

> (b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of thirty-five feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance to, exit from or driveway of, a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.[59]

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[58] An Act Relative to Public Safety, S.B. 1353, 185th Gen. Court (Mass.2007) (enacted), Ex. A to Aff. of Adam T. Martignetti ("Martignetti Aff.") (Trial Ex. 24) [#61-2]. Plaintiffs argue that the preamble constitutes "three very different facts underlying [the bill's] purpose." Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 52[#16]. This court disagrees. All three sections of the preamble clearly relate to public safety.

[59] *Id.*

The Legislature's Joint Committee[60] on Public Safety and Homeland Security ("Committee") held a public Hearing on the bill on May 16, 2007, and received written and oral testimony from law enforcement officials;[61] RHCF staff, volunteers and representatives; and representatives of various advocacy organizations.[62] At the Hearing, the Committee also viewed video footage and photographs of protest activity at certain RHCFs.[63] Additionally, the Committee received written correspondence supporting and opposing the bill.[64]

2. Public Safety and Access to Medical Services

The Committee received testimony that, despite the 2000 Act's floating and fixed buffer zones, significant public safety concerns continued to exist at RHCFs in the Commonwealth, including major concerns regarding safe patient access to medical services.

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[60] Members of the state house and senate serve on the Committee.

[61] Captain Williams Evans ("Evans") of the Boston Police Department testified. Evans is the police commander for the South End, Back Bay, Lower Roxbury and Fenway sections of Boston. *See* Transcription of Videotape of Hearing of the Joint Committee on Public Safety and Homeland Security at 25 ("Hearing Transcript"), Ex. C to Aff. of Vineeth Narayanan ("Narayanan Aff.") (Trial Ex. 26 [#63-4]. Attorney General Coakley, Mary Beth Heffernan, Undersecretary for Criminal Justice, and William Keating, Norfolk County District Attorney, also testified.

[62] *See* Martignetti Aff. at 1 (Trial Ex. 24)[#61].

[63] *See, e.g.*, Hearing Transcript at 16 (Trial Ex. 26) [#63-4].

[64] *See* Compilation of Letters at 2-25 (Trial Ex. 17)[#52].

Attorney General Martha Coakley ("Coakley") explained that the fixed buffer zone was necessary to address the situation:

> This is an important public safety issue. Over the years, reproductive healthcare facilities have been the scene of mass demonstrations, congestion, blockages, disturbances, and even murders. SB 1353 will help ensure greater safety along our public ways and sidewalks and prevent violence, harassment and intimidation of women who are attempting to exercise their fundamental right to access health care.
>
> ...
>
> I support the bill's recognition that "clearly defined boundaries improve the ability of safety officials to protect the public."
>
> ...
>
> Facility employees, volunteers, patients and prospective patients are routinely harassed as they try to enter and exit facilities for medical counseling and treatment. For example, at the Boston location, which has a recessed door, protesters are able to stand close to the entrance, with some protesters standing right at the entrance. Demonstrators regularly crowd facility entrances and surround women, facility employees and volunteers with graphic and discomfiting pictures of aborted fetuses, and shout at and taunt them calling them "baby killers" and "murderers."
>
> ...
>
> [P]atients and employees are forced to step around or through the protestors as they make

> their way into the building. We have heard of some cases where women arrive at the facilities and then leave because they are too upset to pass through the gauntlet of protestors.
>
> Protestors also stand and block cars as patients and employees attempt to enter the driveway or garage entrance to these facilities. Other times, protestors circle cars and put their faces against, or in close proximity to, the car windows to scream at and sometimes videotape people in their cars. In some cases, protestors throw anti-abortion literature and leaflets into people's cars as they enter or exit the facilities. Even more egregious are the protestors who dress as Boston Police Department officers and approach women and their companions at close distance, pretending that they are escorting them to the clinic's entrance, only to taunt them or force leaflets into their hands as they make their way to and from the healthcare facilities.
>
> All of these actions can and do easily spark reaction and response and create an unsafe, dangerous risk along our public ways. The actions directly impede the normal flow of traffic along the Commonwealth's public ways and sidewalks and hinder women's ability to access reproductive healthcare.[65]

The Legislature also heard testimony from RHCF staff, volunteers and law enforcement personnel re-

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[65] Martha Coakley Written Testimony, Ex. D to Martignetti Aff. (Trial Ex. 24) [#61-5] (spacing modified).

garding specific incidents of patient harassment and intimidation in the areas immediately outside RHCF entrances and driveways. Additionally, the Legislature learned about protesters blocking access RHCFs by physically positioning themselves very close to RHCF entrances and driveways.[66] Examples included the following:

- One clinic volunteer at a Boston RHCF reported:

> The protestors are moving closer and closer to the main door. They scream and block the way for the patients to get into the clinic. We fill out police reports almost every week regarding the way they encroach upon the door, but nothing has changed.[67]
>
> They get very close to the patients and escorts inside the buffer zone....[68]
>
> [T]hey're getting so close that patients are terrified to even walk into the clinic. I've

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[66] Indeed, Captain Evans testified:

> A lot of people are under the misconception that [the law] prevents protestors from going into that buffer zone, which is incorrect. Protestors can stand up right in front of the door. A lot of them hold signs right there. As long as they stay stationary, you know, they can stand in front of that door. William Evans Oral Testimony, Hearing Transcript at 25 (Trial Ex. 26) [#63-4].

[67] Gail Kaplan Written Testimony, Ex. C to Martignetti Aff. (paragraph number omitted) (Trial Ex. 24) [#61-4].

[68] *Id.* (paragraph number omitted).

> had people ask me, isn't there a back way....[69]
>
> When it is raining, it is exceptionally bad. Many of the protestors are inside the buffer zone with very large umbrellas and have no regard for who they hit with them. I have often been swiped with the points on their umbrellas and have nearly fallen to avoid being hit.[70]

- The president of Planned Parenthood League of Massachusetts personally observed the following at the organization's Boston facility:
  - Protestors screaming at patients and employees inside the current 'buffer zone', usually right at the doorway....
  - Protesters photographing and filming into patients and employees' cars and taking photos of license plate numbers to post on websites
  - Protesters standing in front of cars and the keypad to the garage to block access, so that they can throw pamphlets and other propaganda into cars entering the garage
  - And, most deceptively, I've seen protesters dress up wearing Boston Police T-shirts and hats, trying to collect patient contact information, videotaping, and in other ways trying to

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[69] Gail Kaplan Oral Testimony, Hearing Transcript at 40 (Trial Ex. 26) [#63-4].

[70] Gail Kaplan Written Testimony, Ex. C to Martignetti Aff. (paragraph number omitted) (Trial Ex. 24) [#61-4].

> intimidate those who are simply exercising their legal right to seek confidential medical services[71]

- A Planned Parenthood volunteer reported that protesters stood in front of the building's entrance, "every Saturday morning, every week."[72] She explained:

> There are several long-time protesters who appear in front of Planned Parenthood....
>
> When women approach the building, protesters fan out and approach them.
>
> ...
>
> The clear intent of the vast majority of protesters is to deter people from entering the building at all. The current buffer zone ... does not permit protesters to 'approach' anyone without consent in the zone, but it does not speak to standing still in front of the building's entrance and thereby forcing patients to approach them.
>
> ...

Physical blocking is practiced regularly by protesters. They either stand in front of the door, in the middle of the sidewalk, or in front of car doors as cars pull up to the sidewalk. Some people pull up in cars and roll down their window to ask about the clinic's secure

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[71] Diane Luby Written Testimony at 2, Ex. G to Martignetti Aff. (Trial Ex. 24) [#61-8].

[72] Liz McMahon Written Testimony at 1, Ex. F to Martignetti Aff. (Trial Ex. 24) [#61-7].

parking garage. If the protesters get to the car first, they have been repeatedly heard to tell people that the garage is closed, when it is not. They also shove pamphlets through the open window, regardless of the occupant's requests.

In the rear of the building, near the clinic's garage entrance ... protesters often wait by the door and video tape the patients' cars' license plates.[73]

- At an Attleboro RHCF, a patient advocate reported:

> [P]rotesters impede access to clinic doors, but also create safety issues for the general public trying to use sidewalks, streets or driveways.
>
> ...
>
> [P]rotesters walk back and forth across the entrance of the driveway.... Though prohibited from standing in the entrance of the driveway, they frequently stop there until threatened with police action. There have been instances of picketers either slowing or speeding up to narrowly avoid being hit by cars driven by staff. Patients have reported feeling too intimidated by the pacing protesters to enter the property, and turning back.[74]

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[73] *Id.* at 1-2.

[74] Melissa Conroy Written Testimony, Ex. B to Martignetti Aff. (Trial Ex. 24) [#61-3].

- 1 At one RHCF, on a weekly basis, women try to drive to the facility but turn away "because they're afraid to enter the parking lot entranceway, [protesters] will block so as not to allow the car to come in, and then we have the other protestors dressed in paraphernalia who will come over to the window with a clipboard and ask them to please sign in before they come through the driveway."[75]
- Likewise, at one RHCF, "You can also see people circling in the same car around and around, and every time they pull up, you can see that they want to go out and they'll ask where is the garage and then they never stop."[76]
- A protester followed a woman into a Boston RHCF entranceway. At the same location, another protester approached and placed her head inside a car outside the clinic.[77]
- A protester wearing a "Boston Police" shirt, standing immediately next to a car trying to enter an RHCF garage.[78]
- Protestors "wearing police hats and police uniforms" as a way to get patients and others to consent to an approach.[79]

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[75] Michael Baniukiewicz Oral Testimony, Hearing Transcript at 50-51 (Trial Ex. 26) [#63-4].

[76] Liz McMahon Oral Testimony, Hearing Transcript at 51 (Trial Ex. 26) [#63-4].

[77] *See* Martha Coakley Oral Testimony, Hearing Transcript at 18-19 (Trial Ex. 26) [#63-4].

[78] William Evans Oral Testimony, Hearing Transcript at 36 (Trial Ex. 26) [#63-4].

3. Law Enforcement's Position

The Legislature also received testimony about the difficulties of enforcing the 2000 Act.[80] The record demonstrates that these difficulties reduced the efficacy of the statute's intended protections, and were part of the reason that significant public safety concerns continued to exist at RHCFs. Attorney General Coakley explained:

> The current law provides no clearly defined boundary because it is a "floating" buffer zone within a defined radius of eighteen feet, so the buffer zone effectively moves and shifts as people pass along the public way to facility entrances or driveways. Either ignoring the law, or inadequately measuring the six-foot distance around a moving person, protestors routinely invade the existing buffer zone *in violation of the law*. This fact alone has made it very diffi-

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[79] *Id.* at 35-37.

[80] Plaintiffs argue that because a proposed amendment to Senate Bill 1353 did not make it into the final bill, "it appears the General Court rejected allegations that the [2000] Act was enforceable." Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 51. The proposed amendment was a line that stated, "The general court hereby finds that law enforcement officials have testified about practical problems related to the enforcement of [the 2000 Act]." *Id.* (*citing* Mass. Senate Journal, Oct. 23, 2007). This argument is unpersuasive. The Legislature may not have adopted this amendment for a number of reasons, upon which this court will not speculate. Regardless, however, of why this line was not included, the Legislature heard and considered testimony regarding enforcement difficulties with the 2000 Act. The record also demonstrates that enforcement difficulties were related to the public safety problems.

> cult if not impossible for police to be able to immediately or ever determine whether a violation has occurred.
>
> Another problem with the existing law is the inability to discern whether a patient, her companions, or facility employees have consented to a given protester's approach. Some protesters have said that they believed that a patient "consented" because of the way she made eye contact or because a patient uttered a statement in response to a protestor's comment (even if that statement was not one of consent)
>
> ...
>
> Given the lack of a clearly defined buffer zone boundary, it has been very difficult, if not impossible, for police officers to monitor the distance these protestors maintain between themselves and the persons approaching the facilities and determine if there has been a violation; in other words, to enforce the law.[81]

Echoing Coakley's remarks, Massachusetts law enforcement personnel reported significant difficulties in enforcing the 2000 Act, and urged legislators to modify the law. Captain Evans reported, "This law, the way it stands, the current buffer zone with the 18-foot buffer zone, makes it very difficult for us to enforce the law."[82] Mainly, the police had trouble determining whether a

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[81] Martha Coakley Written Testimony at 4-6, Ex. D to Martignetti Aff. (emphasis in original) (spacing modified) (Trial Ex. 24) [#61-5].

[82] William Evans Oral Testimony, Hearing Transcript at 25 (Trial Ex. 26) [#63-4].

protester had "approached" a person within the six feet floating buffer, without that person's consent. Evans explained:

> What [the protesters] have to do is make an approach. Now what an approach is is very hard to determine; whether they stick out their hand, that's an approach; where they take a step forward, that's an approach. Basically, it turns us into basically something like—I like to make the reference of a basketball referee down there, where we're watching feet, we're watching hands.[83]

This "constant watching" proved difficult and created a public safety problem. At one of the RHCFs, for example, there have been "over 100 protestors every Saturday and a lot of them go right up in the faces of patients entering the premises."[84] Additionally, such surveillance was a significant "tying up of resources" that the police "had to deal with [for] seven years."[85]

Contrary to Plaintiffs' assertions at oral argument,[86] the police and district attorneys tried to prosecute violations of the 2000 Act. Evans indicated his frustration with trying to prosecute violations at one of the RHCF locations:

> We've trying [sic] everything, honestly. We've tried violation of the buffer zone, and we've

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[83] *Id.* at 25-56.

[84] *Id.* at 26-27.

[85] *Id.* at 26.

[86] *See, e.g.*, Prelim. Bench Trial Transcript at 73.

> brought a few cases up to Brighton Court and the court has basically not supported us....
>
> Chairman, we know all the players down there. We know the regular protesters. We back up the stay-away orders and nothing seems to work down there.[87]

Evans noted that at one of the RHCFs, police had made "no more than five or so arrests."[88] The low number of arrests, however, was due to the difficulty of enforcing the law, not a lack of problematic conduct. Evans explained:

> Again, [it is] a very difficult law to enforce, what an approach is, what isn't. I mean, like I said, people can stand inside the buffer zone, and given the current set up of Planned Parenthood there, their door is in 10 feet of—actually, their buffer zone is really only 8 feet outside because of the setup.
>
> So it's such close quarters as it is there that everybody is in everybody's face, no matter what. So the buffer zone basically is no good, it really isn't, because just the proximity. It's almost like a goalie's crease out there....
>
> So given that fact, it makes it very difficult for us to say someone is violating it because

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[87] William Evans Oral Testimony, Hearing Transcript at 34-35 (Trial Ex. 26) [#63-4].

[88] *Id.* at 33.

> they're allowed to stand outside the door, with the sign in their hand.[89]

In response to these problems, Captain Evans urged the Legislature to implement the 35-foot fixed buffer zone:

> Week in and week out, we are constantly receiving calls down there [at one of the facilities], both from protestors and from Planned Parenthood on violations. I think clearly having a fixed buffer zone, where everyone knows the rules and nobody can go in that and protest, will make our job so much easier. I think you've seen the video; you see what we have to deal with. You know, it's a very difficult rule to enforce.
>
> You know, there's the misconception that it's a fixed area where no protestors can go. That would be great. That would make our job so much easier.
>
> ...
>
> So I encourage the Committee and the legislators to support this bill. Not only will it safeguard the patients going in there, but it will also make the public safety official's job a lot easier. So I welcome the 35-foot buffer zone.[90]

With respect to the problem of protesters wearing police hats and uniforms, Evans noted:

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[89] *Id.* at 33-34.

[90] *Id.* at 26-27.

> [W]e've tried everything, and I think the only thing honestly that will keep these people out and the patients safe is to establish a fixed zone. That way there's no watching feet, watching hands and allowing protesters right up in their face.[91]

4. First Amendment Concerns Articulated by Advocacy Groups

The Public Safety Committee also received testimony and correspondence from several organizations that voiced First Amendment concerns about the bill. For example, the American Civil Liberties Union of Massachusetts opposed the bill, mainly on overbreadth grounds.[92] Wendy Kaminer of the Defending Dissent Foundation expressed her "dismay about the effect of this bill on free speech."[93] Marie Sturgis of Massachusetts Citizens for Life, Inc. testified, "To increase the size of the existing area without substantial reason would be an action that demonstrates unquestionable bias and clashes with First Amendment rights."[94] C.J. Doyle of the Catholic Action League of Massachusetts stated, "The proposed expansion of existing buffer zone legislation represents yet another effort to impose a content based restriction on freedom of speech, and to impair other constitutionally protected First Amend-

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[91] *Id.* at 35.

[92] *See* Statement of the ACLU of Massachusetts (Trial Ex. 17)[#52].

[93] Wendy Kaminer Written Testimony at 1 (Trial Ex. 17)[#52].

[94] Marie Sturgis Written Testimony (Trial Ex. 17)[#52].

ment activity such as freedom of religion and freedom of assembly."[95]

5. Balancing First Amendment Concerns

The Legislature specifically acknowledged these First Amendment concerns, and took them into account. Indeed, at the May 16, 2007 Hearing, several legislators discussed the importance of balancing public safety considerations with the First Amendment rights of the protesters. Representative Marty Walz explained:

> What we're seeking here is to amend the existing buffer zone law around healthcare clinics to establish a fixed buffer zone of only 35 feet, so much smaller than the 150 feet that we're accustomed to around polling places, and so for that 35 feet, we think that is an appropriate balance and one that strikes the right balance between First Amendment rights of protesters and the rights of women and other patients and family members and staff members to enter unimpeded into the healthcare clinics, so to recognize that there are competing rights and interests here, just as there are at polling places, and we think a 35-foot fixed buffer zone strikes the right balance to protect women entering and exiting the clinics.[96]

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[95] Letter from C.J. Doyle, Catholic Action League to Committee, May 16, 2007 (Trial Ex. 17)[#52].

[96] Marty Walz Oral Testimony, Hearing Transcript at 7 (Trial Ex. 26) [#63-4].

Similarly, Representative Michael Festa stated that the 2000 Act balanced the "First Amendment issues" with the concern "that without unfettered and reasonable access to these health services, that many women were being intimidated from having those services provided in an appropriate manner."[97] Addressing the 2007 Act, Representative Festa commented:

> I think this bill, quite frankly, strikes the balance in a way in 2007 that we can acknowledge, does give due respect for those who feel that they have need to express their objections to this whole situation, and at the same time, acknowledge that 35 feet is quite reasonable....
>
> [T]his bill, I think, fundamentally does what needs to be done today, which is to give that protection and also afford the right to those who are concerned to express their views.[98]

The Legislature also specifically solicited and heard testimony on balancing these concerns. Senator Jarrett Barrios, the Committee's Chairman, stated:

> [S]ince I've got three of the finest lawyers in Massachusetts in front of me, and one of the leading arguments that is made in opposition to this is infringement on First Amendment rights which the federal government, and obviously there's a state equivalent to that.
>
> ...

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[97] Michael Festa Oral Testimony, Hearing Transcript at 11-12 (Trial Ex. 26) [#63-4].

[98] *Id.* at 12-13.

> And I'm interested in your thoughts, if you have any, specifically as to why that's not the case.[99]

Attorney General Coakley responded that the law was a constitutional time, place and manner restriction that appropriately balanced patient rights, protester rights and public safety considerations.[100] Additionally, after recognizing the importance of First Amendment rights,[101] Coakley emphasized the balancing process: "There's always a balance involved" in First Amendment situations, "and I think it's an appropriate question and I think the Legislature has to weigh this."[102] Similarly, Keating noted, "I also view this in a Constitutional sense as a contest of competing freedoms...."[103] Heffernan agreed with Coakley and Keating, and briefly echoed their comments.[104]

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[99] Jarrett Barrios Oral Testimony, Hearing Transcript at 29-30 (Trial Ex. 26) [#63-4].

[100] Martha Coakley Oral Testimony, Hearing Transcript at 30-32 (Trial Ex. 26) [#63-4]. *See also* Martha Coakley Written Testimony at 6-7, Ex. D to Martignetti Aff. (discussing how the proposed bill protected First Amendment rights) (Trial Ex. 24) [#61-5].

[101] *Id.* at 30 ("I think all four of us take that right of the First Amendment extremely seriously....").

[102] *Id.* at 30.

[103] William Keating Oral Testimony, Hearing Transcript at 32 (Trial Ex. 26) [#63-4].

[104] *See* Mary Beth Heffernan Oral Testimony, Hearing Transcript at 32-33 (Trial Ex. 26) [#63-4].

G. The 2007 Act

After receiving and considering this testimony, the Legislature enacted Senate Bill 1353 on November 8, 2007,[105] titled "An Act Relative to Reproductive Health Care Facilities ("Act or 2007 Act")," Chapter 155 of the Acts of 2007.[106] The Act contained an emergency preamble:

> *Whereas*, The deferred operation of this act would tend to defeat its purpose, which is to increase forthwith public safety at reproductive health care facilities, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety.[107]

The Act itself read:

> Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:
>
> SECTION 1. Section 120E1/2 of chapter 266 of the General Laws, as appearing in the 2006 Official Edition, is hereby amended by inserting after the word "within", in line 2, the following words:– or upon the grounds of.

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[105] *See* Martignetti Aff. at 3 (Trial Exhibit 24)[#61] ("Senate No. 1353 in its final form was passed by the Senate and the House on November 8, 2007.").

[106] An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)) (emphasis in original) (Trial Ex. 1)[#36].

[107] *Id.* (emphasis in original).

SECTION 2. Subsection (b) of said section 120E1/2 of said chapter 266, as so appearing, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence:- No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.[108]

The Act did not affect the 2000 Act's exemptions:

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for

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[108] *Id.*

> the purpose of reaching a destination other than such facility.[109]

The Act also maintained the business hours and clearly marked restriction of the 2000 Act: "The provisions of subsection (b) shall only take effect during a facility's business hours and if the area contained within the radius and rectangle described in said subsection (b) is clearly marked and posted."[110]

Governor Patrick signed the bill on November 13, 2007.[111]

H. Attorney General's Guidance on the 2007 Act

On January 25, 2008, the Attorney General's Office sent a letter to law enforcement personnel and RHCFs subject to the Act's coverage.[112] The letter summarized

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[109] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(b) (2007) (spacing modified) (Trial Ex. 3)[#38].

[110] *Id.* § 120E1/2(2)(c) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(c) (2007) (Trial Ex. 3).

[111] *See* An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)) (Trial Ex. 1); Martignetti Aff. at 3 (Trial Ex. 24)[#61].

[112] *See* Narayanan Aff. at 1 (Trial Ex. 26)[#63]; Letters from Maura T. Healey, Chief, Civil Rights Division, to the Boston and Brookline Police Departments, Ex. A to Narayanan Aff. (Trial Ex. 26) [#63-2]; Letters from Maura T. Healey, Chief, Civil Rights Division, to Planned Parenthood League of Massachusetts and Women's Health Services, Ex. B to Narayanan Aff. (Trial Ex. 26) [#63-3]. Aside from slight differences in the introductory paragraph, the letters are identical. Accordingly, this court will refer to the letter as the "2008 Guidance Letter."

the Act, and emphasized that the Act's provisions were in effect only during an RHCF's business hours and only if the boundaries were "clearly marked and posted."[113] The letter also provided "guidance to assist you in applying the four exemptions" in the Act, which consisted of the following four paragraphs:

> The first exemption—for persons entering or leaving the clinic—only allows people to cross through the buffer zone on their way to or from the clinic. It does not permit companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose.
>
> The second exemption—for employees or agents of the clinic acting within the scope of their employment—allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone.
>
> Similarly, the third exemption—for municipal employees or agents acting within the scope of their employment—does not allow municipal agents to express their views about abortion or to engage in any other partisan speech within the buffer zone.

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[113] 2008 Guidance Letter at 1-2 (Trial Ex. 26).

> Finally, the fourth exemption—for persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic—applies to individuals who are crossing through the buffer zone, without stopping, to go somewhere other than a location within the zone and other than the clinic, and who are not using the buffer zone for some other purpose while passing through. For example, an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech).[114]

The Attorney General's approach with respect to the second exemption directly tracks its approach to

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[114] *Id.* at 2-3 (Trial Ex. 26).

this exemption in the 2000 Act,[115] an approach approved by the First Circuit in *McGuire II*.[116]

Discussion: Legal Standard for Facial Challenge

Three different standards may apply to Plaintiffs' facial challenge.[117]

In *United States v. Salerno*, the Supreme Court held that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[118]

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[115] In the 2003 Guidance Letter, the Attorney General emphasized that " '*all persons* in the restricted area, including clinic employees and agents, are subject to the restrictions in Section 120E 1/2(b) of the Act, including the restriction on oral protest, education, or counseling[,]' and that clinic employees and agents may not use the exemption to 'express their views about abortion[.]' " *McGuire v. Reilly*, 271 F. Supp. 2d 335, 339-40 (D. Mass. 2003) (Harrington, J.), *aff'd*, *McGuire II*, 386 F.3d 45 (1st Cir. 2004) (*quoting* 2003 Guidance Letter) (emphasis added).

[116] *McGuire II*, 386 F.3d at 64 ("[W]e find the Attorney General's interpretation to be one very likely interpretation of the exemption's language ... [,]" and it "is important for our purposes ... because it is clearly a proper, content-neutral way of interpreting the exemption."). *See also supra* Factual Findings § E.

[117] *See, e.g., United States v. Carta*, 503 F. Supp. 2d 405 (D. Mass. 2007) (Tauro, J.) ("The precise test to apply to a facial challenge is not clear.").

[118] 481 U.S. 739, 745 (1987). *See also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621 (2008) ("Given the fact that petitioners have advanced a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persua-

Second, although "some Members of the Court have criticized the Salerno formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.' "[119]

Lastly, in the First Amendment context, there is another "type of facial challenge ... under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.' "[120]

For the reasons below, the Act survives under all three standards.

Discussion: First Amendment Challenge

A. First Amendment Doctrine

The Free Speech Clause of the First Amendment states that "Congress shall make no law ... abridging the freedom of speech...."[121] This prohibition applies to

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sion."); *McGuire I*, 260 F.3d at 46-47 ("a party who mounts a facial challenge to a statute must carry a significantly heavier burden than one who seeks merely to sidetrack a particular application of the law.").

[119] *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (*quoting Washington v. Glucksberg*, 521 U.S. 702, 739-40, and n.7 (1997) (Stevens, J., concurring in judgments)).

[120] *Id.* at 1191 n.6 (*citing New York v. Ferber*, 458 U.S. 747, 769-771 (1982) and *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[121] U.S. Const. Amend. I.

the states by virtue of the Fourteenth Amendment.[122] As clarified by the First Circuit, "Notwithstanding its exalted position in the pantheon of fundamental freedoms, free speech always must be balanced against the state's responsibility to preserve and protect other important rights. This balance may be weighted differently, however, depending upon the nature of the restriction that the government seeks to foster."[123]

"The Supreme Court has articulated a framework for determining whether a particular regulation impermissibly infringes upon free speech rights. That framework dictates the level of judicial scrutiny that is due—and that choice, in turn, informs the nature of the restrictions on free speech that may be permissible in a public forum."[124]

The appropriate level of scrutiny depends on whether a statute is content-based or content-neutral.[125] As a general rule, the government cannot impose content-based restrictions on speech.[126] Any

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[122] *See Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 30-31 (1st Cir. 2001) (*citing Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

[123] *McGuire I*, 260 F.3d at 42. *See also Knights of Columbus*, 272 F.3d at 31 ("Despite the uncompromising language in which this proscription is couched, it is not absolute.").

[124] *Knights of Columbus*, 272 F.3d at 31 (*citing McGuire I*, 260 F.3d at 42).

[125] *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 32 (1st Cir. 2008) ("A threshold question in cases involving challenges to government restrictions on speech is whether the restriction at issue is content-neutral or, to the contrary, is content-based.").

[126] *McGuire I*, 260 F.3d at 42 (*citing Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994)).

such restriction is presumptively invalid, and must be evaluated under strict scrutiny.[127] A content-based law, therefore, will be upheld only if it is "absolutely necessary to serve a compelling state interest and is narrowly tailored to the achievement of that end."[128]

Instead of regulating the content of speech, content-neutral restrictions regulate the time, place and manner in which expression may occur. Content-neutral restrictions "are less threatening to freedom of speech because they tend to burden speech only incidentally, that is, for reasons unrelated to the speech's content or the speaker's viewpoint."[129] As a result, these restrictions are evaluated under the "intermediate" level of scrutiny, and will be upheld if (1) "they are justified without reference to the content of the regulated speech;" (2) "are narrowly tailored to serve a significant governmental interest;" and (3) "leave open ample alternative channels for communication of the information."[130]

B. Content-Based versus Content-Neutral

Plaintiffs argue that the Act constitutes an impermissible content-based restriction on speech. This ar-

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[127] *Id.* at 43 (*citing R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995)).

[128] *Id.* (citing, as examples, *Boos v. Barry*, 485 U.S. 312, 321-29 (1988); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987)).

[129] *Id.*

[130] *Id.* (*quoting Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

gument takes two forms. First, Plaintiffs, albeit briefly, urge this court to find that the statute itself is a content-based restriction.[131] Second, in their Complaint, Plaintiffs bring a viewpoint discrimination count,[132] and "courts correctly regard viewpoint discrimination as a particularly pernicious form of content discrimination...."[133]

Alternatively, Plaintiffs argue that the Act is an impermissible time, place and manner regulation.[134]

Defendant argues that the act is content-neutral and validly regulates the time, place and manner of expressive activity. This court agrees.

1. No Subject Matter Restriction

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[135] Accordingly, "a law designed to serve purposes unrelated to the content of protected speech is deemed content-

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[131] *See, e.g.*, Pls.' Proposed Findings of Fact and Conclusions of Law at 27 ("PFF") [#69].

[132] Compl. at 18-19.

[133] *McGuire I*, 260 F.3d at 48.

[134] *See* Compl. at 15; PFF at 27-32.

[135] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See also Hill v. Colorado*, 530 U.S. 703, 719 (2000) (*citing Ward*); *Naser Jewelers, Inc.*, 513 F.3d at 32; *McGuire I*, 260 F.3d at 43.

neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched."[136]

Here, as with the 2000 Act, "[b]y addressing political speech on public streets and sidewalks, the Act plainly operates at the core of the First Amendment."[137] But "First Amendment interests nonetheless must be harmonized with the state's need to exercise its traditional police powers."[138] As the First Circuit did in *McGuire I*, for the following reasons, this court "resolve[s] this balance" in favor of the Commonwealth.[139]

As noted above, in *Hill v. Colorado*, the Supreme Court considered a Colorado statute that also regulated conduct around reproductive health care facilities.[140] The Court held that the statute was content-neutral for "three independent reasons."[141]

> First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur.
>
> Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative his-

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[136] *McGuire I*, 260 F.3d at 43 (*citing Hill*, 530 U.S. at 736; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

[137] *Id.* at 43 (*citing Hague v. CIO*, 307 U.S. 496, 515 (1939)).

[138] *Id.* at 44 (*citing Hill*, 530 U.S. at 714-15).

[139] *Id.*

[140] 530 U.S. at 707.

[141] *Id.* at 719.

> tory, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech."
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> Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech....[142]

Here, the 2007 Act is content-neutral for the same three reasons. First, the statute does not directly regulate speech. Indeed, it does not mention speech or expression at all, much less prohibit certain types of messages, statements, literature or signage.[143] Instead, and permissibly, "it merely regulates the places *where* communications may occur."[144] Moreover, the statute continues to apply during an RHCF's business hours only, and only if the buffer zone is clearly delineated.[145]

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[142] *Id.* at 719-720 (footnote omitted and spacing modified).

[143] *See id.* at 731 ("As we have already noted, [the statute] simply does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements.").

[144] *Id.* (emphasis added).

[145] *See* Mass. Gen. Laws ch. 266 § 120E1/2(2)(c) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(c) (2007) (Trial Ex. 3); 2008 Guidance Letter at 1-2 (Trial Ex. 26).

Second, the record clearly demonstrates that the Legislature did not adopt the 2007 Act "because of disagreement with the message it conveys."[146] The Legislature amended the 2000 Act to address continued and serious public safety problems in the areas adjacent to RHCF entrances and driveways, including significant concerns regarding safe patient access to medical services. Relatedly, serious enforcement difficulties with the 2000 Act limited its intended protections and were part of the reason that major public safety concerns continued to exist at RHCFs.

These reasons are entirely "unrelated to disagreement with the underlying message of particular speech."[147] Moreover, as with the 2000 Act, the 2007 Act's "restrictions apply equally to *all demonstrators, regardless of viewpoint*, and the statutory language makes no reference to the content of the speech."[148] Indeed, this "comprehensiveness ... is a virtue ... because it is evidence against there being a discriminatory governmental motive."[149]

Third, as in *Hill*, the statute "advances interests unconnected to expressive content."[150] "As [the Court has] repeatedly explained, government regulation of expressive activity is 'content neutral' if it is justified

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[146] *Ward*, 491 U.S. at 791.

[147] *McGuire I*, 260 F.3d at 44.

[148] *Hill*, 530 U.S. at 719 (emphasis added).

[149] *Id.* at 731.

[150] *McGuire I*, 260 F.3d at 44 (*citing Hill*, 530 U.S. at 719).

without reference to the content of regulated speech."[151]

Here, as was the case with the 2000 Act, "[t]he Massachusetts legislature, confronted with an apparently serious public safety problem, investigated the matter thoroughly."[152] As described above, the investigation demonstrated that there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways. Moreover, major enforcement difficulties with the 2000 Act allowed the problems to persist. Accordingly, as in *McGuire I*, the Act is justified by "conventional objectives of the state's police power—promoting public health, preserving personal security, and affording safe access to medical services," without *any* reference to content.[153]

Focusing on this third reason, the First Circuit explained:

> The critical question in determining content neutrality is not whether certain speakers are disproportionately burdened, but, rather, whether the reason for the differential treatment is—or is not—content-based.... As long as a regulation serves a legitimate purpose unrelated to expressive content, it is deemed content-neutral even if it has an incidental effect on some speakers and not others.... In that event, all that remains is for the government to

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[151] *Hill*, 530 U.S. at 720.

[152] *McGuire I*, 260 F.3d at 44.

[153] *Id.*

> show that accomplishment of the legitimate purpose that prompted the law also rationally explains its differential impact.[154]

Here, as in *McGuire I*, the Act's goals "justify its specific application to RHCFs."[155] Additionally, "[a]lthough the Act clearly affects anti-abortion protesters more than other groups, there is no principled basis for assuming that this differential treatment results from a fundamental disagreement with the content of their expression."[156] As in *McGuire I*,

> [T]he finding required on these facts is that the legislature was making every effort to restrict as little speech as possible while combating the deleterious secondary effects of anti-abortion protests. Just as targeting medical centers did not render Colorado's counterpart statute content based, ... so too the Act's targeting of RHCFs fails to undermine its status as a content neutral regulation.[157]

Plaintiffs, however, as the plaintiffs did in *McGuire I*, imply that the Legislature's reasons for amending the Act were pretextual.[158] Additionally, Plaintiffs argue:

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[154] *Id.* (citations omitted).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See, e.g.*, Prelim. Bench Trial Transcript at 70-71 ("Mr. DePrimo: Well, that's what they claim their purpose is.").

> [I]t is only abortion providers and supporters that talk about all these problems that are around the clinics. And they don't do it with respect to facts. They make conclusory allegations.
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> ...
>
> These people would be expected to embellish their testimony because they side with the pro choice viewpoint as opposed to those who oppose abortion.
>
> But when we look at the objective unbiased evidence in the record, there is nothing that supports the zone. The police didn't testify that there was any problem outside the abortion clinics. They didn't say that there was any impeding, any blocking, any harassment, any trespass.[159]

Plaintiffs' arguments fail for two reasons. First, with respect to the Legislature's reasons for amending the statute, Plaintiffs' "insinuations are unsupported by any record evidence."[160] Moreover, "where differential treatment is justified, on an objective basis, by the government's content-neutral effort to combat secondary effects, it is insufficient that a regulation may have been adopted in direct response to the negative impact of a particular form of speech."[161]

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[159] *Id.* at 72-73 (spacing modified).

[160] *McGuire I*, 260 F.3d at 45.

[161] *Id.*

Second, despite Plaintiffs' claims regarding the evidence before the Legislature, the record is replete with factual references to specific incidents and patterns of problematic behavior around RHCFs. Additionally, nothing in the record suggests that the individuals who testified—under oath—before the Legislature, embellished or were in any way untruthful.

Lastly, although Plaintiffs claim abortion providers and supporters were the only individuals who identified problems, Captain Evans of the Boston Police Department testified with respect to public safety problems outside of the RHCFs and the difficulties with enforcing the 2000 Act. Attorney General Coakley testified regarding the same.

2. Count V. Viewpoint Discrimination[162]

Plaintiffs also argue that the statute constitutes unlawful viewpoint discrimination, because "[t]he fixed buffer statute unjustifiably treats the conduct of the facility employees/agents differently from all other speakers, and the different treatment of conduct results in favor toward pro-choice speakers and disfavor toward all other speakers."[163] Plaintiffs base this claim on the employee/agent exemption in the Act, which exempts from the Act's coverage "employees or agents of such facility acting within the scope of their employment."[164]

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[162] This Memorandum addresses Plaintiffs' counts by topic, not by their order in the Complaint.

[163] PFF at 40.

[164] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(b) (2007) (Trial Ex. 3).

This count also fails. First, it is important to note that the Act did not modify any of the exemptions previously established by the 2000 Act, including the employee/agent exemption. Furthermore, the First Circuit specifically addressed and upheld this exemption in *McGuire I* and *McGuire II*, holding that it was content-neutral and did not constitute viewpoint discrimination.[165] Nothing in this case warrants a departure from that analysis and holding.

In *McGuire I*, the plaintiffs' argument suggested that "the sole practical purpose of the employee exemption is to promote a particular side of the abortion debate."[166] In response, the court held, among other things,

> The Massachusetts legislature may or may not have intended the employee exemption to serve the purpose envisioned by the plaintiffs. There are other likely explanations. For example, the legislature may have exempted clinic workers—just as it exempted police officers—in order to make crystal clear what already was implicit in the Act: that those who work to secure peaceful access to RHCFs need not fear prosecution.[167]
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> ...
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> Because we can envision at least one legitimate reason for including the employee exemption in

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[165] *See McGuire I*, 260 F.3d at 46-48; *McGuire II*, 386 F.3d at 58.

[166] *McGuire I*, 260 F.3d at 46.

[167] *Id.* at 47.

> the Act, it would be premature to declare the Act unconstitutional for all purposes and in all applications.[168]

The First Circuit concluded, "The employee exemption ... is neutral on its face, drawing no distinction between different ideologies. And to the extent (if at all) that the exemption contributes to the Act's disproportionate impact on anti-abortion protesters, it can be justified by reference to the state's neutral legislative goals."[169]

Similarly, in *McGuire II*, the court held:

> As we explained in *McGuire I*, so long as a reviewing court can "envision at least one legitimate reason for including the employee exemption in the Act," the law is not facially unconstitutional. *McGuire I*, 260 F.3d at 47. In *McGuire I* this court found there were likely explanations for the exemption other than the desire to favor pro-abortion speech over anti-abortion speech: "For example, the legislature may have exempted clinic workers—just as it exempted police officers—in order to make crystal clear ... that those who work to secure peaceful access to RHCFs need not fear prosecution." *Id.* at 47. For this reason given in *McGuire I*, the viewpoint facial attack fails, now as then.[170]

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[168] *Id.*

[169] *Id.* at 48.

[170] *McGuire II*, 386 F.3d at 58.

Plaintiffs try to distinguish *McGuire I* and *McGuire II* on the ground that "[t]he rationale employed to uphold the employee/agent exemption of the floating buffer statute does not apply to the fixed buffer zone statute...."[171] Plaintiffs argue:

> Unlike the fixed buffer statute, the floating buffer statute permitted all persons to access any part of the zone so long as they did not make unconsented to approaches from a distance of 6 feet or less, creating a possibility that the zone could become crowded and therefore make navigation by clinic patients difficult.... The same is not true of the fixed buffer statute. Because pro-life advocates and virtually all other persons are excluded from the zone, patients have unhindered and safe passage through the zone to the clinics.[172]

This argument fails for several reasons. First, contrary to Plaintiffs' contention, the rationale advanced in *McGuire I* continues to apply. *In McGuire I*, the court held that the employee exemption served the goals of the 2000 Act "because clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs."[173] As the record reflects, the same is true today. Accordingly, "[s]ince it is within the scope of their employment for clinic personnel to

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[171] PFF at 41. Plaintiffs make this argument as part of their equal protection count, but because it directly implicates the employee/agent exemption, this court addresses it here. The equal protection count fails for independent reasons discussed below.

[172] *Id.*

[173] *McGuire I*, 260 F.3d at 46.

escort patients in this fashion, and since a primary purpose of the law is to facilitate safe access, the employee exemption serves the basic objectives of the Act."[174]

Additionally, "[t]o cinch matters, the legislature could have concluded that clinic employees are less likely to engage in directing of unwanted speech toward captive listeners—a datum that the *Hill* court recognized as justifying the statute there."[175] As with the 2000 Act, the legislature likely concluded the same thing here when deciding to maintain the exemption.

Second, even assuming that the rationale applies with less weight here than with the 2000 Act—contrary to the position of this court—as long as there is "one legitimate reason for including the employee exemption in the Act," the law is not facially unconstitutional.[176] In addressing the identical employee/agent exemption, the *McGuire I* court found "other likely explanations for the exemption," and gave the example cited twice above. The same example applies here: "the legislature may have exempted clinic workers—just as it exempted police officers—in order to make crystal clear ... that those who work to secure peaceful access to RHCFs need not fear prosecution."[177] Accordingly,

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[174] *Id.*

[175] *Id.*

[176] *Id.* at 47; *McGuire II*, 386 F.3d at 58 (*citing McGuire I*, 260 F.3d at 47). As noted above, the First Circuit emphasized this point in both *McGuire* cases.

[177] *McGuire I*, 260 F.3d at 47; *McGuire II*, 386 F.3d at 58 (*citing McGuire I*, 260 F.3d at 47). *See also McGuire I*, 260 F.3d at 46 (Holding that "testimony taken before the state senate indicates

there is "at least one legitimate reason for including the employee exemption in the Act, [and] it would be premature to declare the Act unconstitutional for all purposes and in all applications."[178]

Plaintiffs also argue, "Whether or not by design, the fixed buffer statute allows escorts with pro-choice viewpoints to express their views in the zone while prohibiting most other persons from expressing their views in the zone."[179]

This argument also fails, at least on this facial challenge.[180] On its face, the statute does not permit advocacy of any kind in the zone. Moreover, the Attorney General's enforcement position expressly and unequivocally prohibits any advocacy by employees and agents of the RHCF's in the buffer zone:[181]

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beyond cavil that the employee exemption will promote the Act's goals because clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs.").

[178] *McGuire I*, 260 F.3d at 47.

[179] PFF at 41.

[180] If "experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy ... [,]" Plaintiffs may present this argument during the as-applied challenge. *McGuire I*, 260 F.3d at 47.

[181] Although this is a facial challenge, this court may properly consider the Attorney General's enforcement position. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.") (*citing Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). *See also Ward v.*

> The second exemption—for employees or agents of the clinic acting within the scope of their employment—allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone.[182]

This approach is consistent with the Attorney General's past interpretation of the exemption,[183] an approach the District Court and the First Circuit cited with approval in *McGuire II*.[184] As with the 2000 Act, the Attorney General's current position "require[s] evenhanded enforcement of its prohibitions, even against clinic employees and agents...."[185] It is "one very likely interpretation of the exemption's language," and "is clearly a proper, content-neutral way of interpreting the exemption."[186]

For these reasons, the employee exemption does not discriminate based on viewpoint, and Count V of Plaintiffs' Complaint fails.

Rock Against Racism, 491 U.S. 781, 795-96 (1989) (*quoting Hoffman Estates*, 455 U.S. at 494 n.5).

[182] 2008 Guidance Letter at 2 (Trial Ex. 26).

[183] *See supra* Factual Findings § D.

[184] *See McGuire II*, 386 F.3d at 65-66; *McGuire v. Reilly*, 271 F. Supp. 2d 335, 341 (D. Mass. 2003). *See also supra* Factual Findings § E.

[185] *McGuire v. Reilly*, 271 F. Supp. 2d at 341.

[186] *McGuire II*, 386 F.3d at 64.

3. Conclusion Regarding Content Neutrality

On its face, the 2007 Act is a content-neutral time, place and manner restriction, and the employee exemption does not constitute viewpoint discrimination. Accordingly, this court evaluates the Act using intermediate scrutiny.

C. Count I. Time, Place and Manner Restriction

Time, place and manner regulations will be upheld if (1) "they are justified without reference to the content of the regulated speech;" (2) "are narrowly tailored to serve a significant governmental interest;" and (3) "leave open ample alternative channels for communication of the information."[187] Here, the Act meets all three prongs of the test.

1. Justified Without Reference to Content of Regulated Speech

As explained above, the statute is justified without any reference to the content of regulated speech. The Act's purpose is "to increase forthwith public safety at reproductive healthcare facilities,"[188] by protecting public safety in the areas adjacent to RHCF entrances and driveways, and ensuring safe patient access to medical services.[189] "The interests that underlie these

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[187] *McGuire I*, 260 F.3d at 43 (*quoting Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

[188] An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)). (Trial Ex. 1)[#36].

[189] The Commonwealth's public safety goal is furthered by the statute's attempt to eliminate the enforcement difficulties with

purposes are firmly rooted in the state's traditional police powers, and these are precisely the sort of interests that justify some incidental burdening of First Amendment rights."[190]

2. Narrowly Tailored

The Supreme Court has repeatedly held that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."[191] Instead, a law is narrowly tailored if it " 'promotes a substantial government interest that would be achieved less effectively absent the regulation,' "[192] and "does so without burdening substan-

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the 2000 Act's floating zone. As noted, these difficulties limited the 2000 Act's intended protections and were part of the reason that major public safety concerns persisted at RHCFs.

[190] *McGuire I*, 260 F.3d at 48 (*citing Hill*, 530 U.S. at 715 (noting the "enduring importance of the right to be free from persistent importunity, following and dogging after an offer to communicate has been declined") (citation and internal quotation marks omitted)); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997) (extolling the significance of "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services"); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 772-73 (1994) ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.").

[191] *Ward*, 491 U.S. at 798.

[192] *Id.* at 799 (*quoting U.S. v. Albertini*, 472 U.S. 675, 689 (1985)).

tially more speech than is necessary to further this goal."[193]

As long as this test is satisfied, a "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[194] "Put another way, the validity of time, place, or manner regulations is not subject to 'a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.' "[195]

Lastly, this court "must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary."[196] "States and municipalities plainly have a substantial interest in controlling the activity around certain public and private places," and the Supreme Court has recognized "the unique concerns that surround health care facilities...."[197]

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[193] *McGuire I*, 260 F.3d at 48 (*citing Ward*, 491 U.S. at 799). *See also Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 30 (1st Cir. 2008) (*citing Ward*, 491 U.S. at 799).

[194] *Ward*, 491 U.S. at 800; *Naser*, 513 F.3d at 35 (*citing Ward*, 491 U.S. at 800).

[195] *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 12 (1st Cir. 2004) (*citing Ward*, 491 U.S. at 800) (internal citations and quotation marks omitted).

[196] *Hill*, 530 U.S. at 728 (*quoting Madsen*, 512 U.S. at 772).

[197] *Id.*

Here, the Commonwealth has a substantial and legitimate content-neutral interest in protecting public safety at RHCF entrances and driveways, because "[i]t is a traditional exercise of the States' police powers to protect the health and safety of their citizens."[198] The Commonwealth also has a legitimate, content-neutral interest in providing "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests."[199] Indeed, Plaintiffs appear to acknowledge the importance of this interest: "[I]t appears the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services. This is a legitimate interest."[200] Additionally, at the Bench Trial, Plaintiffs noted: "In this particular case the legitimate sweep is what? It is clearing out the bottleneck ... immediately adjacent to the doors and to the driveways. Certainly blocking, impeding, trespass is actually a significant interest. That's a legitimate interest of the government."[201]

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[198] *Hill*, 530 U.S. at 715 (internal citations and quotation marks omitted).

[199] *Id.* (*citing Madsen*, 512 U.S. 753; *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979)). *See also id.* at 728 ("Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions. The State of Colorado has responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers' ability to approach.").

[200] PFF at 34 (*citing McGuire I*, 260 F.3d at 44).

[201] Prelim. Bench Trial Transcript at 76.

Having found qualifying governmental interests, this court now determines that the law is narrowly tailored to serve those interests. Despite the passage of the 2000 Act, the Commonwealth faced significant public safety problems in the areas adjacent to RHCF entrances and driveways, including serious concerns regarding safe patient access to medical services. As a result, following an investigation, the Legislature reasonably concluded that the 2000 Act's floating buffer zone was insufficient,[202] and determined that a 35-foot fixed buffer zone was immediately necessary to protect public safety and ensure patient access to clinics. Accordingly, based on the record before the Legislature and the record before this court, promoting these public safety interests would be achieved less effectively without the fixed-buffer zone law.

Additionally, the law does not burden substantially more speech than necessary to further these public safety goals. Again, "the government is not required to choose the least restrictive approach in content-neutral regulation."[203] Here, the Legislature appears to have carefully considered and balanced the Act's effects on speech with the Commonwealth's legitimate governmental interests. The result was a 35-foot fixed buffer zone that targeted the problematic areas (areas immediately adjacent to RHCF entrances and driveways),

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[202] *See, e.g., McGuire I*, 260 F.3d at 49 (holding that "[t]he Massachusetts legislature reasonably concluded that ***existing law inadequately addressed*** the public safety, personal security, traffic, and health care concerns created by persistent demonstrations outside RHCFs.") (emphasis added).

[203] *Naser*, 513 F.3d at 36.

during the problematic times (an RHCF's business hours).

Furthermore, the Supreme Court and other federal courts have upheld several fixed zones as "narrowly tailored" under the First Amendment. For example, in *Madsen*, the Court upheld part of an injunction that created a 36-foot fixed buffer zone around an RHCF's entrances and driveway.[204] Also, in *Schenck*, the Court upheld an injunction that created a 15-foot fixed buffer zone around RHCF entrances, doorways and driveways.[205]

On the record before this court, like in *Schenck*, this court finds that the fixed buffer zone is "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so,"[206] which directly furthers the public safety and access goals of the Commonwealth. As in *Madsen* and *Schenck*, "the record shows that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots."[207] As such, the Legislature "was entitled to conclude that the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances," and

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[204] *See Madsen*, 512 U.S. 753. The Court invalidated other aspects of the injunction, including the 36-foot buffer zone as applied to certain private property surrounding the clinic. *See id.* at 776.

[205] *See Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997).

[206] *Id.* at 380.

[207] *Id.*

"the only way to ensure access was to move all protesters away from the doorways."[208]

Lastly, the exact size of the buffer zone is not a choice for this court to make.[209] Maybe the Legislature's concerns warranted a slightly larger buffer zone, or maybe the Legislature could have accomplished its objectives with a slightly smaller zone. It is the view of this court, however, considering all of the evidence before the Legislature and this court, the Legislature's choice of 35 feet was a reasonable one under the circumstances, and one that was narrowly tailored to promoted the Commonwealth's substantial and legitimate interests.

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[208] *Id.* at 380-381 (emphasis in original). Similarly, as this court noted at the Bench Trial, "the government has the right to neutralize a certain amount of property." Prelim. Bench Trial Transcript at 79.

[209] Again, "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Ward*, 491 U.S. at 800 (internal citations and quotation marks omitted). Additionally, "Courts owe legislative judgments substantial respect and, as a general matter, should be reluctant ' "to reduce statutory language to a merely illustrative function." ' " *McGuire I*, 260 F.3d at 47 (*quoting Mass. Ass'n of HMO v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999)).

i. Note: Plaintiffs' Challenges to Legislature's Evidence

Plaintiffs argue that the Legislature based the 2007 Act on outdated evidence that preceded the passage of the 2000 Act.[210] This argument carries no weight.

First, virtually all of the evidence presented to the Legislature in 2007 addressed the public safety situation in the years *following* the enactment of the 2000 Act, including information from the then-recent past. This cannot be considered stale by any means.

Second, based on the record before this court, the post-2000 Act evidence formed the primary basis for the Legislature's adoption of the 2007 Act.

Third, the Legislature may certainly "make use of past experience," as long as "the degree to which inferences drawn from past experience are plausible."[211] Here, to the extent the Legislature considered the Commonwealth's history of public safety problems at RHCFs, it was reasonable to do so, particularly because the "past experience" derived from a relatively recent time frame. Indeed, this would be expected prior to the passage of most public safety laws. Additionally, it was plausible and reasonable for the Legisla-

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[210] *See, e.g.*, Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 48 (characterizing the evidentiary record as "stale").

[211] *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004). Indeed, Plaintiffs acknowledged this at the Bench Trial. *See* Prelim. Bench Trial Transcript at 38 ("In *Bl(a)ck Tea Society* the First Circuit said that the government can consider past experiences but, I mean, there has to be a fairly reasonable nexus, a plausible nexus between what happened in the past and what's happened in the future.").

ture to infer from past experiences at RHCFs that these problems would continue unless the 2000 Act was passed.

Plaintiffs also argue that nothing in the record supports creation of the fixed zone. According to Plaintiffs: "There is no evidence that anything happened between 2000 and 2007 that warranted the increase in the size of the buffer zone or even the fixed buffer zone but for the fact that the police were having difficulty in enforcing it. That's it."[212]

Similarly, Plaintiffs claim:

> The police didn't testify that there was any problem outside the abortion clinics. They didn't say there was impeding, any blocking, any harassment, any trespass.
>
> The police are there all the time. That's the testimony in the record. They're there all the time and they didn't see any of the problems that these abortion providers and supporters saw.
>
> Nothing in the record with respect [to] arrests and convictions.
>
> ...
>
> Well, if these things are happening, Judge, why aren't the people who were actually violating the law being prosecuted? And if they're being prosecuted, why are there no convictions? There are no arrests and no convictions in the record with respect to unlawful conduct.

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[212] Prelim. Bench Trial Transcript at 39.

...

> My point is is the lack of arrests and the law of convictions are showing that the illegal unlawful behavior isn't occurring in the first place.[213]

These arguments echo Plaintiffs' claims in the "content-based" versus "content-neutral" debate, and the response is the same. Contrary to Plaintiffs' contentions, the record contains numerous and specific factual references to continued public safety problems around RHCFs in the years following the passage of the 2000 Act, including impeded access, blocking and harassment. All of this evidence went well beyond difficulties in enforcing the 2000 Act.

Furthermore, although Plaintiffs claim that only RHCF employees and supporters identified problems, Captain Evans of the Boston Police Department testified about public safety problems outside of the RHCFs. Attorney General Coakley also testified. Moreover, nothing in the record supports Plaintiffs' implication that RHCF employees and supporters embellished or fabricated their testimony.

Additionally, as explained above, police and district attorneys *tried* to prosecute violations of the 2000 Act, but encountered significant difficulty; and the low number of arrests for violations was due to the difficulty of enforcing the law, not a lack of problematic conduct.

Lastly, although the 2007 Act mainly—if not entirely—responds to an existing public safety and law enforcement problem, the Legislature may certainly

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[213] *Id.* at 73-74 (spacing modified).

take a preventative approach to lawmaking. Indeed, in this case, "[a] bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself."[214]

ii. Note: Plaintiffs' Conduct

Plaintiffs note that their conduct at RHCFs is peaceful, and that they do not block, impede or harass patients or pedestrians.[215] If this case involved an injunction directed at Plaintiffs, the lawfulness and character of their behavior would be important. At this time, however, this court is evaluating a facial challenge to a statute of general application. Accordingly, Plaintiffs' specific conduct is largely, if not entirely, irrelevant to the present analysis.[216]

3. Ample Alternative Channels

i. Alternative Channels

The law also satisfies the final requirement, because it leaves open ample alternative avenues of communication.[217] First, there are important prerequisites

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[214] *Hill*, 530 U.S. at 729.

[215] *See, e.g.*, Decl. of Eleanor McCullen at 2, 4 (Trial Ex. 4); Decl. of Jean Blackburn Zarrella at 2-3 (Trial Ex. 5); Decl. of Carmel Ferrell at 2-3 (Trial Ex. 6); Decl. of Eric Cadin at 2-3 (Trial Ex. 7); PFF at 3-4.

[216] Moreover, this court does not have a complete record on such conduct.

[217] Plaintiffs may try to establish otherwise during their as-applied challenge, but this court cannot make such a finding on this facial challenge.

for the Act to apply at a particular RHCF: the buffer zone must be clearly marked and posted, and is only enforceable during the normal business hours of the clinic.[218] Additionally, when in effect, the Act only applies within 35-foot radii of RHCF entrances and driveways, not around the entire property line.[219]

Furthermore, as long as Plaintiffs—or anyone for that matter—remain outside the zone, they may freely talk to individuals entering and exiting the RHCFs, as well as people inside the zone. The Act also does nothing to prevent patients from leaving the zone to speak with protesters or counselors. Moreover, individuals may continue to display signs and photographs, hand out literature, talk, pray, chant, sing or engage in any other form of lawful communication or protest outside of the buffer zone. Importantly, most, if not all of this expressive activity, can be seen and heard by people entering and exiting the buffer zone, and also by people inside the buffer zone.[220]

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[218] Mass. Gen. Laws ch. 266, § 120E1/2(2)(c) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(c) (2007) (Trial Ex. 3).

[219] An Act Relative to Public Safety at Reproductive Health Care Facilities, Chapter 155 of the Acts of 2007 (codified as amended at Mass. Gen. Laws ch. 266, § 120E1/2 (2007)) (emphasis in original) (Trial Ex. 1)[#36].

[220] *See, e.g., Madsen*, 512 U.S. at 770 ("Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots."). Plaintiffs may try to establish otherwise during their as-applied challenge, but there is no basis for such a finding at the facial challenge stage.

ii. Plaintiffs' Approach Argument

Plaintiffs argue that "[t]he First Amendment protects the right of speakers to communicate with their intended audience from a normal conversational distance, and distances of 15 feet or more do not, as a matter of law, allow for normal conversation."[221]

The Supreme Court, however, has repeatedly upheld fixed buffer zones that have the effect of limiting normal conversation within the zone. For example, in *Madsen* and *Schenck*, respectively, the Court upheld 36-foot and 15-foot fixed buffer zones around RHCF entrances and driveways.[222]

Plaintiffs, however, urge that *Schenck* supports their position. There, the Court addressed both a floating and a fixed buffer zone. The floating zone required all protesters to stay at least 15 feet away from any individual or vehicle seeking access to or leaving an RHCF, regardless of the person or vehicle's location.[223] The fixed buffer zone prohibited "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities."[224]

The Court observed that the floating buffer zone "prevented defendants ... from communicating a mes-

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[221] PFF at 29.

[222] *Madsen*, 512 U.S. at 768-71; *Schenck*, 519 U.S. at 374-76. Likewise, albeit in a different context, the Court upheld a 100-foot fixed "campaign free" zone around polling places. *See Burson v. Freeman*, 504 U.S. 191, 210-11 (1992).

[223] *See Schenck*, 519 U.S. at 366.

[224] *Id.* (internal quotation marks omitted).

sage from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks," and that this was a "broad prohibition, both because of the type of speech that is restricted and the nature of the location."[225] But, "[o]n the other hand, we have before us a record that shows physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct. In some situations, a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."[226]

The Court, however, declined to decide "whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two."[227] Instead, the Court held that "because this broad prohibition on speech 'floats,' it cannot be sustained on this record."[228] The Court explained:

> [I]t would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms pro-

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[225] *Id.* at 377.

[226] *Id.*

[227] *Id.*

[228] *Id.*

> hibits. That is, attempts to stand 15 feet from someone entering or leaving a clinic and to communicate a message—certainly protected on the face of the injunction—will be hazardous if one wishes to remain in compliance with the injunction.[229]

Significantly, however, the Court *upheld* the 15-foot fixed buffer zone around RHCF entrances and driveways,[230] even though the effect on conversation was similar.

Here, the buffer zone is fixed, not floating. Accordingly, the Court's concern regarding the uncertainty that attaches to a floating zone disappears. A fixed zone provides a bright-line rule for violations: if you are a non-exempt person in the zone, you are violating the Act.[231] Moreover, as discussed in the narrowly tailored analysis, this court finds that the substantial governmental interests involved here justify the creation of the 35-foot fixed buffer zone.

Additionally, although the Supreme Court cases control the holding here, this court briefly notes the First Circuit's decision in *Bl(a)ck Tea Society v. City of Boston*.[232] There, the First Circuit considered and up-

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[229] *Id.* at 378 (internal citations omitted).

[230] *Id.* at 380-81 ("We uphold the fixed buffer zones around the doorways, driveways, and driveway entrances. These buffer zones are necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so....").

[231] This also provides the police with clear guidelines for enforcing the law.

[232] 378 F.3d 8 (1st Cir. 2004).

held the establishment of a "designated demonstration zone" for the 2004 Democratic National Convention.[233]

The designated zone "allowed no opportunity for physical interaction (such as the distribution of leaflets) and severely curtailed any chance for one-on-one conversation."[234] The court held, however, among other things, that "although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access."[235]

The same applies here. Although slightly closer physical interaction may partially enhance one's ability to sidewalk counsel RHCF patients, there is no constitutional right to that level of particularized access.

4. Conclusion Regarding Time, Place and Manner Restriction

For the foregoing reasons, this court finds that the 2007 Act (1) is justified without reference to the content of the regulated speech; (2) is narrowly tailored to serve significant governmental interests; and (3) leaves open ample alternative channels for communication. Accordingly, the Act is a lawful time, place and manner restriction, and Defendant prevails on Count I of Plaintiffs' Complaint.

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[233] *Id.* at 10.

[234] *Id.* at 13.

[235] *Id.* at 14.

D. Note on Public Forum Doctrine

Although Plaintiffs do not press a separate public forum challenge, Plaintiffs correctly note that sidewalks and streets are "'quintessential' public forums."[236] Plaintiffs also dedicate a section of their brief to the subject of free speech on public streets and sidewalks.[237] Accordingly, this court will conduct a separate public forum analysis.

Governments can regulate public forums if the restrictions meet the appropriate level of scrutiny. As noted, while content-based regulations must survive strict scrutiny,[238] content-neutral time, place and manner restrictions must pass intermediate scrutiny.[239]

Here, the Act clearly can affect sidewalks and streets in the vicinity of RHCFs, and is thereby subject to the public forum doctrine. For the reasons above, however, the Act is content-neutral, time, place and manner regulation. Accordingly, intermediate scrutiny applies, and this court has already held that the Act passes this level of scrutiny. The Act, therefore, also survives a separate public forum challenge.

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[236] *See* PFF at 18 (*citing Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *United States v. Grace*, 461 U.S. 171, 179 (1983)).

[237] *See* "The Nature of Public Streets and Sidewalks," *id.* at 18-19; "Free Speech on Public Streets and Sidewalks," *id.* at 20-22.

[238] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

[239] *Id.* ("The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.").

E. Count II. Overbreadth Challenge

Plaintiffs also assert that the Act is overbroad because it burdens more speech than is necessary to achieve a substantial and legitimate government interest. There are two main parts to this argument. First, Plaintiffs argue that the "statute bans from the zone all types of speech ... and all manner of speech ... not only the abortion-related speech ....[,]"[240] and the government's interest is not served by such a broad ban.[241] Second, Plaintiffs argue that the statute unconstitutionally burdens personal liberty interests, because it "prohibits virtually all persons from standing in or utilizing the zone for any and all purposes other than 'reaching a destination other than such facility.' "[242]

The Supreme Court rejected similar arguments in *Hill v. Colorado*, and the Court's analysis applies with equal weight here. There, the Court held, "The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute."[243] Here, all persons entering and exiting the health care facilities share the legitimate health and safety interests served by the Act.

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[240] PFF at 33.

[241] *See id.* at 35-36.

[242] *See id.* at 34 (*quoting* Mass. Gen. Laws ch. 266, § 120E1/2(b) (2007)).

[243] *Hill*, 530 U.S. 703, 730-31 (2000).

Furthermore, as noted in the content-neutral discussion, the Act's "comprehensiveness ... is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive."[244] Indeed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[245]

Additionally, as already noted, the Act "simply does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It merely regulates the places where communications may occur."[246]

Addressing Plaintiffs' overbreadth argument more generally, "a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[247] The Court, however, "vigorously enforce[s]" the substantiality requirement, "not only in an absolute sense, but also rela-

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[244] *Id.* at 731.

[245] *Id.*

[246] *Id.*

[247] *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 n.6 (2008) (*citing New York v. Ferber*, 458 U.S. 747, 769-71 (1982) (internal citations and quotation marks omitted)). *See also Hill*, 530 U.S. at 732 (" 'particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' ") (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

tive to the statute's plainly legitimate sweep."[248] Additionally, "[t]he overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.' "[249]

On the record before this court on Plaintiffs' facial challenge, Plaintiffs have not established that "the impact of the statute on the conduct of other speakers will differ from its impact on their own sidewalk counseling."[250] "Like [Plaintiffs'] own activities, the conduct of other protesters and counselors at all health care facilities are encompassed within the statute's 'legitimate sweep.' "[251] Accordingly, Count II must fail.

F. Count III. Prior Restraint

Plaintiffs also assert that the Act constitutes an impermissible prior restraint on speech in violation of the First and Fourteenth Amendments. The Act, however, is not a prior restraint, because the Commonwealth "has not sought to prevent speech, but, rather, to regulate the place and manner of its expression."[252] Indeed, "The Supreme Court has explicitly rejected attempts to analyze security-based time-place-manner

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[248] *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008) (*citing Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989); *Broadrick*, 413 U.S. at 615).

[249] *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988) (*quoting Broadrick*, 413 U.S. at 613). *See also Williams*, 128 S. Ct. at 1838; *Wash. State Grange*, 128 S. Ct. at 1191 n.6.

[250] *Hill*, 530 U.S. at 732.

[251] *Id.*

[252] *Bl(a)ck Tea Society*, 378 F.3d 8, 12 (1st Cir. 2004).

restrictions as prior restraints," including in *Hill*, *Schenck* and *Madsen*, "and those cases are controlling here."[253] As cautioned by the First Circuit, "If content-neutral prohibitions on speech at certain places were deemed prior restraints, the intermediate standard of review prescribed in the time-place-manner jurisprudence would be eviscerated."[254]

Accordingly, Count III of Plaintiffs' Complaint fails.

G. Count IV. "Free Speech—Free Association—Free Exercise Hybrid"

Plaintiffs also argue that "the Act implicates rights to free speech, free assembly, free association and free exercise of religion,"[255] and that "[i]nfringement of the right to free exercise of religion exercised in combination of other fundamental constitutional rights subjects the Act to strict scrutiny review."[256] This court will first address each of these rights individually.

1. Free Exercise Claim

"The Free Exercise Clause also is made applicable to the states (and, therefore, to municipalities) through the Fourteenth Amendment."[257] The clause states that

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[253] *Id.* (*citing Hill*, 530 U.S. at 733-34; *Schenck*, 519 U.S. at 374 n.6; *Madsen*, 512 U.S. at 763 n.2).

[254] *Id.*

[255] Pl. Mem. of Law in Supp. of Mot. for Prelim. Inj. at 39.

[256] Compl. at 18.

[257] *Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 35 (1st Cir. 2001) (*citing Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

"Congress shall make no law ... prohibiting the free exercise [of religion] ...."[258] If, however, " 'a law ... is neutral and of general applicability,' " it " 'need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.' "[259]

Here, this court has already determined that the Act is a generally-applicable, content-neutral statute that passes intermediate scrutiny. The Act does not regulate speech, expression, prayer, singing, worship or display of religious articles. It merely regulates where such expression may take place, i.e., outside of a clearly marked buffer zone during the normal business hours of an RHCF. The Act also applies to all non-exempt persons equally. As a result, this court is "bound to conclude that the regulation does not discriminate against a particular religion or religious practice."[260] Accordingly, as a matter of law, Plaintiffs "cannot rewardingly invoke the Free Exercise Clause in their attack on the regulation."[261]

2. Freedom of Speech

This court has already determined that the Act is a lawful, content-neutral time, place and manner restriction; is not overbroad; and does not constitute a prior

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[258] U.S. Const. Amend. I.

[259] *Knights of Columbus*, 272 F.3d at 35 (*quoting Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993)).

[260] *Id.*

[261] *Id.*

restraint. Accordingly, Plaintiffs' free speech claim fails.

3. Freedom of Assembly and Association

The Supreme Court has held, "Regulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[262]

Here, the Act does not impose a "severe" burden on a protester's right to assemble or associate. As noted above, the Act permits ample alternative channels of communication, because, among other things, individuals are free to demonstrate and associate outside the buffer zone. Moreover, for the reasons above, the Commonwealth's interests are of sufficient importance to justify the 35-foot fixed buffer zone. Accordingly, the Act does not violate the First Amendment's right to associate or assemble peaceably.

4. No Hybrid Cause of Action

All of Plaintiffs' First Amendment individual claims fail, leaving Plaintiffs' "hybrid" cause of action. Again, Plaintiffs argue that "heightened review applies when free exercise rights are infringed in combination with other fundamental constitutional rights."[263]

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[262] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal citations and quotation marks omitted).

[263] Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 39. Plaintiffs base this count on *Employment Div., Dept. of Human Resources*

Although the First Circuit has yet to decide the "hybrid rights" issue definitively,[264] this court declines to apply strict scrutiny to the instant case.[265] After reviewing all of Plaintiffs constitutional claims on an individual basis and finding no violation, this court will not engage in multiplication theory. Notwithstanding the Supreme Court's dicta in *Smith*,[266] there is no basis in

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of Oregon v. Smith, where the Court observed, "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press...." 494 U.S. 872, 882 (1990), *rehearing denied*, 496 U.S. 913 (1990) (subsequent history omitted).

[264] *See Parker v. Hurley*, 514 F.3d 87, 98 (1st Cir. 2008) (declining to "enter[] the fray over the meaning and application of *Smith*'s 'hybrid situations' language"). The court did, however, note that "[n]o published circuit court opinion, including *Brown [v. Hot, Sexy & Safer Productions*, 68 F.3d 525 (1st Cir. 1995)], has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim." *Id.* at 98. Additionally, "[o]ther circuits have held explicitly that *Smith* does not create a new category of hybrid claims." *Id.*

[265] The court has already held that the Act passes intermediate scrutiny.

[266] The Court's observation was incidental and unnecessary to the outcome of the case. Indeed, the Court specifically acknowledged, "The present case does not present such a hybrid situation." *Smith*, 494 U.S. at 882. Accordingly, the comment is dicta and non-binding. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003) ("We have held, by contrast, in the context of claims involving free exercise and free speech, that *Smith*'s 'language relating to hybrid claims is dicta and not binding on this court.' ") (*quoting Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)). This court also does not believe that the statement rises to the level of a "carefully considered statement"

the Constitution for heightening the level of review simply based on the number of rights asserted or implicated in a case.[267] Either a plaintiff has a constitutional claim or she does not.[268]

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recognized by the First Circuit as controlling precedent. *See United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993).

[267] *See, e.g., Leebaert*, 332 F.3d at 144 ("We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated. Therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard to evaluate hybrid claims.") (internal citations and quotation marks omitted); *Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) ("We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the free Exercise Clause if it did not implicate other constitutional rights."). *See also Hialeah*, 508 U.S. at 567 (Souter, J., concurring) ("[T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.").

[268] This court notes, however, that even assuming the existence of a "hybrid rights" doctrine, Plaintiffs' "hybrid" claim would still fail. Under the doctrine, a plaintiff must still establish an independently viable constitutional violation, or at least a "colorable" associated claim. *See, e.g., Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) ("Based on the analyses of Appellants' speech, assembly, and equal protection claims that follow, however, we find them individually lacking the

Accordingly, Count IV of the Complaint also fails.

Discussion: Count VIII. Equal Protection Challenge

Plaintiffs also assert that the employees/agents exemption of the Act violates the Equal Protection Clause. As such, Plaintiffs argue that the Act "impinges fundamental rights and liberty interests and therefore is subject to strict scrutiny review."[269] This court's other holdings regarding the Act, however, and the case law, foreclose such an argument.

"From time to time, the Supreme Court has invoked equal protection rather than free speech, as the basis for invalidating a content-based speech restriction."[270] "But where the state shows a satisfactory rationale for a content-neutral time, place, and manner regulation, that regulation necessarily passes the ra-

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merit necessary to withstand summary judgment.... Appellants have identified no constitutionally protected interest upon which the [statute] infringes, as they must in order to establish a hybrid rights claim requiring heightened scrutiny."); *EEOC v. Catholic University of America*, 83 F.3d 455, 467 (D.C. Cir. 1996) (acknowledging a "hybrid situation," but finding no independently viable constitutional claim). *See also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1148 (9th Cir. 2000) (characterizing *EEOC* as "requiring that a free exercise claim based on the hybrid rights exception must include an independently viable claim of infringement of a companion right"). For the "colorable" claim requirement, see, for example, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006) (explaining that "hybrid rights exception" requires a "colorable independent constitutional claim"). Here, for the reasons above, Plaintiffs have not established either. Accordingly, any "hybrid" claim would fail.

[269] Compl. at 22.

[270] *McGuire I*, 260 F.3d at 49.

tional basis test employed under the Equal Protection Clause."[271]

Here, as discussed above, the exemption is content-neutral and there are satisfactory rationales for the exemption. Accordingly, "the Act passes muster under the Equal Protection Clause for the same reasons that it passes muster under the First Amendment."[272]

Furthermore, as explained above, intermediate scrutiny applies, not strict scrutiny.[273] Because this court has already held that the Act survives intermediate scrutiny, Count VIII of Plaintiffs' Complaint also fails.

Discussion: Due Process Challenges

A. Count VI. Vagueness

1. Plaintiffs' Position

Plaintiffs argue that the Act is unconstitutionally vague because of one of the Act's exemptions.[274] Exemption four excludes from the Act's coverage "persons using the public sidewalk or street right-of-way

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[271] *Id.* at 49-50.

[272] *Id.* at 50.

[273] *See, e.g., Sullivan v. City of Augusta*, 511 F.3d 16, 32-33 (1st Cir. 2007) ("Unlike regulations that are not content-neutral, which are reviewed under a harsher strict-scrutiny standard, ... content-neutral regulations are reviewed under so-called intermediate scrutiny.").

[274] *See* Compl. at 19-20; PFF at 42-43.

adjacent to such facility solely for the purpose of reaching a destination other than such facility."[275]

Plaintiffs find two words of the exemption problematic. First, Plaintiffs argue that "solely" is unclear, "because there are often multiple reasons for persons to travel from one place to another."[276] Second, Plaintiffs argue that "destination" is unclear, "because a person need not have a destination as a reason to use a public sidewalk."[277]

Plaintiffs also argue that "it is unclear whether the statute permits plaintiffs to walk through the zone carrying a sign, or wearing a t-shirt or hat with an abortion-related or partisan message."[278] According to Plaintiffs, "Based on the Attorney General's guidance letter, it appears they cannot," because, "[a]s construed by the Attorney General, the term 'partisan speech' is undefined, forcing a person to guess about the conduct proscribed."[279]

2. Attorney General's Guidance

As noted above, the Attorney General's 2008 Guidance Letter addresses all of the exemptions, including the fourth:

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[275] Mass. Gen. Laws ch. 266, § 120E1/2(2)(b) (2000), *amended by* Mass. Gen. Laws ch. 266 § 120 E1/2(b) (2007) (spacing modified) (Trial Ex. 3).

[276] PFF at 42.

[277] *Id.* at 43.

[278] *Id.*

[279] *Id.*

> Finally, the fourth exemption—for persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic—applies to individuals who are crossing through the buffer zone, without stopping, to go somewhere other than a location within the zone and other than the clinic, and who are not using the buffer zone for some other purpose while passing through. For example, an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech).[280]

3. Legal Standard for Vagueness

The Due Process Clause of the Fifth Amendment " 'mandates that, before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable be prohibited with sufficient specificity to forewarn of the proscription of said conduct.' "[281] Accordingly, " '[a]s generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what

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[280] 2008 Guidance Letter at 3 (Trial Ex. 26).

[281] *United States v. Lachman*, 387 F.3d 42, 56 (1st Cir. 2004) (*quoting United States v. Anzalone*, 766 F.2d 676, 678 (1st Cir. 1985)).

conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' "[282]

"The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague."[283] Indeed, " 'Many statutes will have some inherent vagueness.... Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.' "[284]

Lastly, as acknowledged by Plaintiffs,[285] "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."[286]

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[282] *Id.* at 56 (*quoting Kolender v. Lawson*, 461 U.S. 352, 357 (1983) and *citing Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964)). *See also United States v Williams*, 128 S. Ct. 1830, 1845 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.").

[283] *Id.*

[284] *Id.* (*quoting Rose v. Locke*, 423 U.S. 48, 49-50 (1975)).

[285] *See* PFF at 18.

[286] *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 n.5 (1982) (*citing Grayned*, 408 U.S. at 110). *See also McGuire II*, 386 F.3d at 58 (internal citations and quotation marks omitted).

4. Vagueness Standard Applied

Reading the statute "as a whole,"[287] this court finds the exemption to be clear on its face. "Solely," meaning "to the exclusion of all else,"[288] should not confuse a person of ordinary intelligence.[289] The exemption applies if an individual walks through the zone with the sole purpose of walking home or to work or to the store. Additionally, if a counselor or protester decides to walk through the zone with the *sole* purpose of getting to the other side, the exemption applies. What the statute prohibits is walking through the zone with the purpose of engaging in an activity *other than* reaching the other side. This would clearly not be passing through the zone "to the exclusion of all else."

Moreover, the word "destination," meaning "the place to which one is journeying,"[290] is also clear. Plaintiffs disagree, and argue, as an example, that a person jogging or strolling does not necessarily have a destination. This argument is unpersuasive. A jogger's destination is to the end of his run, which may be at the end of the block or in the next neighborhood. Indeed, for purposes of the exemption, any destination is fine, so long as it is not in the middle of a clearly marked buffer zone during an RHCF's business hours. Even the aimless stroller has a likely destination in mind before she

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[287] *See Schenck v. Pro-Choice Network*, 519 U.S. 357, 383 (1997) (*citing Grayned*, 408 U.S. at 110).

[288] *Merriam-Webster's Collegiate Dictionary* 1114 (Definition 2) (10th ed.2000).

[289] *Williams*, 128 S. Ct. at 1845.

[290] *Id.* at 314 (Definition 3).

turns around. In any event, the word is sufficiently clear for ordinary people to understand.

Furthermore, even assuming that the exemption requires some degree of explanation, the Attorney General's interpretation eliminates any possible confusion.[291] Not only is the Attorney General's construction reasonable, it comports with a common sense and plain read of the language.

Also, despite Plaintiffs' contention, the Attorney General's guidance is clear. The 2008 Guidance Letter states, "an individual may cross through the buffer zone to reach and speak with someone outside the zone, to reach and stand in a location outside the zone (perhaps to engage in lawful protest, other speech, or prayer), or to travel on to another place altogether, provided that the individual does not do anything else within the buffer zone (such as expressing their views about abortion or engaging in other partisan speech)."[292]

Although Plaintiffs claim to be confused by this, displaying signs or shirts with abortion-related or partisan messages clearly qualifies as "expressing their views about abortion," which counts as "do[ing] anything else within the buffer zone."[293] As such, the Attorney General's interpretation specifically prohibits

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[291] Again, although this court considers the statute clear on its face, "[t]he mere fact that a statute ... requires interpretation does not render it unconstitutionally vague." *Lachman*, 387 F.3d at 56.

[292] 2008 Guidance Letter at 2 (Trial Ex. 26).

[293] *Id.*

this type of conduct.[294] After all, if individuals could simply walk back and forth all day in the buffer zone engaging in various activities, the main goals of the statute—ensuring public safety and guaranteeing unimpeded and safe access for patients—would be severely frustrated.

Contrary to Plaintiffs' assertion, the phrase "partisan speech" is also not vague such that an ordinary person is "forc[ed] ... to guess about the conduct proscribed."[295] An ordinary person understands "partisan" as support for political party or cause. The formal definition is also consistent with the contemporary use of the word: when used as an adjective, "partisan" means embodying "a firm adheren[ce] to a party, faction, cause or person."[296] Especially when used in the context of "abortion ... or other partisan speech,"[297] an ordinary person would understand that the provision refers to political or cause-related speech. Accordingly, this provides people of ordinary intelligence a reasonable opportunity to understand which type of conduct is prohibited.

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[294] Indeed, and despite their alleged confusion, Plaintiffs appear to acknowledge as such: "On its face, it is unclear whether the statute permits plaintiffs to walk though the zone carrying a sign, or wearing a t-shirt or hat with an abortion-related or partisan message. *Based on the Attorney General's guidance letter, it appears they cannot.*" PFF at 43 (emphasis added).

[295] *Id.*

[296] *Merriam-Webster's Collegiate Dictionary* 845 (Definition 1).

[297] 2008 Guidance Letter at 2 (Trial Ex. 26).

Moreover, the Attorney General's interpretation is authoritative. The Attorney General is the Commonwealth's chief law enforcement officer, and she sent the guidance letter to all law enforcement agencies with an RHCF in their jurisdiction.[298] This court has no reason to believe that the guidance will be anything but strictly heeded. Additionally, if past experience in the *McGuire* line of cases serves as a guide, law enforcement will interpret the statute in a manner consistent with the Attorney General's position.

Finally, despite Plaintiffs' argument to the contrary,[299] nothing in the exemption itself or the Attorney General's interpretation appears to encourage arbitrary and discriminatory enforcement.[300] The exemption and the Attorney General's interpretation of the exemption are clear for the reasons above. Additionally, to the extent the "solely" determination requires a judgment call, " '[a]s always, enforcement requires the exercise of some degree of police judgment.' "[301] As in *Hill*, at least facially, "the degree of judgment involved here is acceptable."[302]

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[298] *See* Narayanan Aff. at 1 (Trial Ex. 26).

[299] *See* Compl. at 20; PFF at 42.

[300] Indeed, the fixed buffer zone itself provides clearer guidance to law enforcement than its predecessor. Instead of a floating buffer zone with a subjective "approach" requirement, the fixed buffer zone—which is clearly marked on the pavement—provides police with a bright-line basis to assess violations. A non-exempt person is either inside the zone or outside the zone.

[301] *Hill*, 530 U.S. 703, 733 (2000) (*quoting Grayned*, 408 U.S. at 114).

[302] *Id.*

For these reasons, the Act is not unconstitutionally vague, and Count VI of Plaintiffs' Complaint fails.

B. Count VII. Liberty Interest

Count VII of the Complaint alleges violation of Plaintiffs' liberty interests protected by the Due Process Clause. Plaintiffs base this claim on the "freedom to loiter for innocent purposes," and "their rights to intrastate travel in violation of the Fourteenth Amendment."[303] Although Plaintiffs did not press this cause of action at the Bench Trial, this court will address it briefly.

Plaintiffs support this cause of action[304] by reference to *City of Chicago v. Morales*.[305] There, the Supreme Court addressed Chicago's "Gang Congregation Ordinance," which prohibited "criminal street gang members" from "loitering" in public places.[306] In addressing the overbreadth doctrine, Justice Stevens noted, writing for the plurality, "[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[307]

The Court, however, explicitly declined "to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to sup-

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[303] Compl. at 21.

[304] *See* Pl. Mem. in Supp. of Mot. for Prelim. Inj. at 33.

[305] 527 U.S. 41 (1999).

[306] *Id.* at 45-46.

[307] *Id.* at 53.

port a facial challenge under the overbreadth doctrine."[308] Instead, the Court found the law unconstitutionally vague.[309] The "freedom to loiter" reference, therefore, was dicta and not precedential.[310]

Even acknowledging, however, a "right to loiter," this court agrees with the Seventh Circuit that "it is not at all clear, and indeed, quite improbable, that Justice Stevens undertook in this statement any type of fundamental rights analysis."[311] Accordingly, even assuming Plaintiffs are "seeking a right to enter" the areas immediately adjacent to RHCF entrances and driveways "simply to wander and loiter innocently," this court "cannot characterize that right as 'fundamental.' "[312]

As a result, this court applies rational basis review to this count.[313] This court has already held, however, that the Act passes intermediate scrutiny. This ends the analysis, and Plaintiffs' liberty interests count also fails.

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[308] *Id.* at 55.

[309] *Id.* at 55-64.

[310] This court also does not believe that the statement rises to the level of a "carefully considered statement" recognized by the First Circuit as controlling precedent. *See United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993).

[311] *Doe v. City of Lafayette*, 377 F.3d 757, 772 (7th Cir. 2004).

[312] *Id.* at 772-773.

[313] *See id.* at 773 ("Because we have concluded that the City's ban does not encroach on a fundamental liberty interest, we are bound to apply the rational basis standard of review to the City's ban.").

Conclusion

For the foregoing reasons, the Act survives under all three facial challenge standards. Because the Act passes constitutional muster under the First Amendment, the Equal Protection Clause and the Due Process Clause, Plaintiffs have fallen far short of establishing that "no set of circumstances exists under which the Act would be valid."[314] Furthermore, the Act has a "plainly legitimate sweep."[315] Lastly, Plaintiffs have failed to establish that the Act is impermissibly overbroad.[316]

Because Defendant prevails on all counts of Plaintiffs' facial challenge, Plaintiffs' request for preliminary and permanent injunctive relief is DENIED.[317]

This matter now proceeds to Plaintiffs' as-applied challenge. A Status Conference shall be held to establish a discovery schedule and trial date.

IT IS SO ORDERED.

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[314] 481 U.S. 739, 745 (1987).

[315] *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (*quoting Washington v. Glucksberg*, 521 U.S. 702, 739-40, and n.7 (1997) (Stevens, J., concurring in judgments)).

[316] *See id.* at 1191 n.6 (*citing New York v. Ferber*, 458 U.S. 747, 769-71 (1982) and *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[317] *See, e.g., McDonald's Corp. v. Rappaport*, 532 F. Supp. 2d 264, 275 n.67 (D. Mass. 2008) (Tauro, J.) ("Because [Plaintiff] has not prevailed on the merits, and all four elements of the injunction standard must be met for an injunction to issue, this court need not address the remaining elements of the standard.").

/s/ Joseph L. Tauro
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 08-2310

ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA; CARMEL FARRELL; ERIC CADIN; GREGORY A. SMITH,
Plaintiffs-Appellants,

v.

MARTHA COAKLEY, Attorney General for the Commonwealth of Massachusetts,
Defendant-Appellee.

Before
Lynch, *Chief Judge*,
Torruella, Boudin, Hansen*,
Lipez, Howard *Circuit Judges*.

ORDER OF COURT
Entered: **August 18, 2009**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is

* Of the U.S. Court of Appeals for the Eighth Circuit sitting by designation.

ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

/s/ Richard Cushing Donovan, Clerk

[cc: Benjamin W. Bull, Timothy D. Chandler, Josephine M. Deang, Michael J. Deprimo, Dwight G. Duncan, Laura K. Langley, Robert E. McDonnell, Philip D. Moran, Kenneth W. Salinger, Anna-Marie L. Tabor, Kevin H. Theriot]

APPENDIX D

STATUTORY PROVISION

Mass. Gen. Laws c. 266, § 120E 1/2. Reproductive health care facilities

(a) For the purposes of this section, "reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.

(b) No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway. This subsection shall not apply to the following:—

(1) persons entering or leaving such facility;

(2) employees or agents of such facility acting within the scope of their employment;

(3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and

(4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

(c) The provisions of subsection (b) shall only take effect during a facility's business hours and if the area

contained within the radius and rectangle described in said subsection (b) is clearly marked and posted.

(d) Whoever knowingly violates this section shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 and not more than $5,000 or not more than two and one-half years in a jail or house of correction, or both such fine and imprisonment. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff or police officer if that sheriff, deputy sheriff, or police officer observes that person violating this section.

(e) Any person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility shall be punished, for the first offense, by a fine of not more than $500 or not more than three months in a jail or house of correction, or by both such fine and imprisonment, and for each subsequent offense, by a fine of not less than $500 nor more than $5,000 or not more than two and one-half years in a jail or house of correction, or by both such fine and imprisonment. A person who knowingly violates this provision may be arrested without a warrant by a sheriff, deputy sheriff or police officer.

(f) A reproductive health care facility or a person whose rights to provide or obtain reproductive health care services have been violated or interfered with by a violation of this section or any person whose rights to express their views, assemble or pray near a reproductive health care facility have been violated or interfered with may commence a civil action for equitable relief.

The civil action shall be commenced either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which any person or entity complained of resides or has a principal place of business.

Supreme Court, U.S.
FILED
FEB 1 - 2010
OFFICE OF THE CLERK

(7)

No. 09-592

In The
Supreme Court of the United States

ELEANOR McCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, and ERIC CADIN,
Petitioners,

v.

MARTHA COAKLEY, Attorney General for the Commonwealth of Massachusetts,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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February 1, 2010

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Question Presented.

To protect public safety and patient access to medical care, the Massachusetts Legislature limited access during business hours to public ways and sidewalks within a fixed "buffer zone" immediately next to entrances and driveways of reproductive health care facilities. In an interlocutory decision, the United States Court of Appeals for the First Circuit held that the statute as amended in 2007 is constitutional on its face. Petitioners' claim that the statute is unconstitutional as applied was stayed and has not yet been decided by the district court.

The question presented is:

Whether the court of appeals correctly applied the long-settled rule of law that statutes regulating the time, place, or manner within or by which communicative activities may take place in public fora are constitutional so long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

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Statement of the Case.

This case concerns a 2007 amendment to a Massachusetts statute that creates a protective "buffer zone" around the entrances and driveways to reproductive health care facilities ("RHCFs"). The United States Court of Appeals for the First Circuit held that "the 2007 Act represents a permissible response by the Massachusetts legislature to what it reasonably perceived as a significant threat to public safety. It is content-neutral, narrowly tailored, and leaves open ample alternative channels of communication. It is, therefore, a valid time-place-manner regulation, and constitutional on its face." Pet. App. 26a.

(1) Statutory Background.

(a) The Original Act.

The Massachusetts Legislature passed the original Reproductive Health Care Facilities Act in August 2000. Pet. App. 4a. Based on a history of violence outside clinics and ongoing harassment and intimidation of women attempting to obtain medical services at such facilities, the Legislature concluded that existing laws did not adequately protect public safety immediately next to RHCFs. *Id.* 33a-37a.

The Legislature considered adopting a fixed, 25-foot buffer zone around clinic entrances and driveways. *Id.* 35a. After *Hill v. Colorado*, 530 U.S. 703 (2000), however, the Legislature instead barred unwelcome approaches for certain purposes near an RHCF entrance or driveway, like the statute upheld in *Hill*. Pet. App. 36a-39a.

The 2000 Act included the following provisions. *First*, similar to the statute in *Hill*, the Act made it unlawful to approach within six feet of someone on a public way or sidewalk inside a zone defined by an 18-foot radius from any RHCF entrance or driveway, or within a six-feet wide rectangle extending from clinic entrances to the street, if the approach was without the person's consent and was for the purpose of "passing a leaflet or handbill," "displaying a sign," or "engaging in oral protest, education or counseling." Pet. App. 38a-39a (quoting Mass. St. 2000, c. 217, § 2(b)).

Second, the Legislature exempted the following four categories of persons from the Act's restrictions:

> (1) persons entering or leaving such facility;
>
> (2) employees or agents of such facility acting within the scope of their employment;
>
> (3) law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment; and
>
> (4) persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.

Pet. App. 39a (quoting Mass. St. 2000, c. 217, § 2(b)).

Third, the Act stated that its provisions "shall only take effect during a facility's business hours and [only] if the area contained within the radius and

rectangle described in said subsection (b) is clearly marked and posted." *Id.*

The original Act was challenged in federal court on constitutional grounds. Pet. App. 41a-43a. The First Circuit reversed a preliminary injunction against enforcement, holding that the Act, "on its face, lawfully regulates the time, place, and manner of speech without discriminating based on content or viewpoint." *McGuire v. Reilly*, 260 F.3d 36, 39 (1st Cir. 2001) ("*McGuire I*"). On remand, the district court held that the Act was constitutional on its face and as applied. *McGuire v. Reilly*, 230 F. Supp. 2d 189, 193 n.10 (D. Mass. 2002) (facial challenge); *McGuire v. Reilly*, 271 F. Supp. 2d 335, 343 (D. Mass. 2003) (as applied). The First Circuit affirmed both rulings, and this Court denied certiorari. *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004), *cert. denied*, 544 U.S. 974 (2005) ("*McGuire II*").

(b) Public Safety Was Still Threatened.

The Massachusetts Legislature revised the Act in November 2007 because "there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways." Pet. App. 75a; *see also id.* 17a, 26a, 43a-64a. The purpose of the 2007 revision was "to increase forthwith public safety at reproductive health care facilities." *Id.* 62a (quoting Mass. St. 2007, c. 155).

At a public hearing before its Joint Committee on Public Safety and Homeland Security, the Legislature had learned that—despite the original Act—clinic access was still being physically blocked,

patients were still being harassed as they tried to enter clinics, and the "approach" element of the floating buffer zone made it very hard for law enforcement officials to enforce the original Act. Pet. App. 45a-58a. It "heard testimony from RHCF staff, volunteers and law enforcement personnel regarding specific incidents of patient harassment and intimidation in the areas immediately outside RHCF entrances and driveways." *Id.* 47a-48a.

Witnesses described how protesters regularly barred access to clinics by physically blocking doors and driveways, and screamed from close range and from immediately next to doorways or driveway entrances at patients trying to enter clinics. Pet. App. 48a-52a. They testified that these confrontations "terrified" patients; that some patients "reported feeling too intimidated by the pacing protesters to enter the property, and turning back;" and that women trying to drive to a clinic would regularly turn away because protesters were blocking the driveway. Pet. App. 48a-50a. A Boston Police Captain testified that protesters would "wear[] police hats and police uniforms" as a way to get patients trying to enter the clinic in Boston to consent to the protester's approach. Pet. App. 52a. Attorney General Coakley summarized the ongoing history of interference with clinic access, and explained why it constituted an important public safety problem. Pet. App. 46a-47a.

In addition, law enforcement representatives told the Legislature that: (i) it was very difficult to enforce the original Act because it was hard to determine whether a protester had "approached" someone else without their consent within the

restricted area; and (ii) creating a fixed and clearly defined buffer zone around RHCF entrances and clinics was needed to ensure public safety. Pet. App. 53a-58a. Capt. Evans compared the 18-foot buffer zone area to a "goalie's crease," where "everybody is in everybody's face," which "makes it very difficult" for the police to determine whether an unlawful "approach" had been made within the buffer zone. *Id.* 56a. He explained that this made it very hard to keep patients safe immediately next to clinic entrances. *Id.* 54a-58a.

The Legislature revised the Act in the manner recommended by law enforcement personnel. Pet. App. 53a-58a, 62a-64a. It did so only after considering whether the proposed revision would adequately protect the public's rights under the Free Speech Clause. Pet. App. 17a, 58a-61a.

(c) The 2007 Amendment.

In November 2007 the Legislature deleted the floating buffer zone provision of the original Act that made it unlawful to approach within six feet of unwilling listeners for specified purposes inside the protected area, and replaced it with a new fixed buffer zone provision that makes it unlawful to "knowingly enter or remain on a public way or sidewalk adjacent to [an RHCF] within a radius of 35 feet of any portion of an entrance, exit or driveway of [an RHCF]." Pet. App. 63a (quoting Mass. G.L. c. 266, § 120E1/2(b)).

In all other substantive respects the buffer zone provision of the Act remains identical to the version previously upheld in *McGuire I* and *McGuire II*. The

Act continues to apply only during a clinic's business hours, and only if the buffer zone limits are "clearly marked and posted." Pet. App. 64a (quoting Mass. G.L. c. 266, § 120E1/2(c)). In addition, the same four categories of persons are exempt from the buffer zone restrictions. Pet. App. 63a-64a.

(2) Factual and Procedural Background.

Petitioners filed this action in January 2008, claiming that the 2007 Act is unconstitutional on its face and as applied. Pet. App. 6a, 30a-31a. Petitioners also moved for a preliminary injunction. *Id.* 31a. Petitioners have not been arrested or threatened with arrest for violating the revised Act, and there is no indication in the record that anyone else has either. Pet. 8 n.3. At Petitioners' request, the district court bifurcated trial of the facial challenge from trial of the as-applied challenge. *Id.* 6a-7a, 31a. The court consolidated the hearing on the motion for preliminary injunction with the hearing on the merits of the facial challenge. *Id.* 7a.

Petitioners' facial challenge was decided after a bench trial on an agreed-upon factual record. Pet. App. 30a-33a. The parties stipulated that the affidavits and exhibits submitted in connection with the preliminary injunction motion would serve as the trial record for the facial challenge. *Id.* 31a. In August 2008 the district court held that the 2007 Act is constitutional on its face, and denied Petitioners' request for injunctive relief. Pet. App. 29a-122a. Petitioners appealed this interlocutory order under 28 U.S.C. § 1292(a)(1). *Id.* 7a.

The court of appeals held that the revised Act is constitutional on its face. Pet. App. 1a-28a. It found

that the law is content neutral because it "was enacted in response to legitimate safety and law enforcement concerns, and was justified by those objectives without reference to the content of any speech." *Id.* 10a. Petitioners had conceded before the district court that, in Petitioners' words, "the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services" and to "clear out the bottleneck ... immediately adjacent to" clinic doors and driveways, and that each of these goals is "a legitimate interest of the government." Pet. App. 88a.

The court "proceeded, therefore, with intermediate scrutiny," *id.* 15a, following the well-established standard that applies to "laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur," *id.* 9a. Applying the next prong of this test, the court of appeals found that the law is narrowly tailored to serve a substantial governmental interest in enhancing public safety around RHCF entrances, without burdening substantially more speech than necessary. *Id.* 15a-17a. With respect to the third prong, the court held that the 2007 Act leaves open ample alternative channels of communication, because it "places no burden at all on the plaintiffs' activities outside the 35-foot buffer zone," and, on its face, the size of the zone was not unreasonable. *Id.* 19a-20a.

In addition, the court of appeals rejected Petitioners' claims that the Act is overbroad on its face because it applies to all potential speakers within the buffer zone instead of applying only to

abortion-related speech. *Id.* 20a-22a. Finally, the court held that the Act is not unconstitutionally vague and does not constitute an unconstitutional prior restraint on speech. *Id.* 24a-26a. The court denied Petitioners' petition for rehearing and rehearing en banc. *Id.* 123a-124a.

Petitioners moved to stay their claims that the Act is unconstitutional as applied while their appeal regarding the facial challenge is pending. The district court granted the motion. The as-applied challenge remains stayed. *Cf.* Pet. 8 n.3.

Reasons for Denying the Petition.

The decision below is consistent with the Court's well-established standard for how to evaluate the constitutionality of restrictions on the time or place for engaging in expressive activity in public fora, and does not raise any important but unresolved federal question. Nor does it conflict with decisions of other courts of appeals. Moreover, the petition concerns an interlocutory appeal that does not raise any issue of immediate importance. Further review is not warranted.

I. There Is No Conflict with the Court's Prior Buffer Zone Cases.

A. The Decision Below Is Consistent with *Madsen*, *Schenck*, and *Hill*, and Applied the Proper Legal Standard.

The court of appeals' determination that it was constitutionally permissible for the Massachusetts Legislature to create a 35-foot fixed buffer zone around clinic entrances and driveways, in order to

ensure safe patient access to medical services provided by RHCFs, is consistent with the Court's precedent. In particular, the decision below is consistent with *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and *Hill v. Colorado*, 530 U.S. 703 (2000).

Madsen upheld an injunction barring protesters from public rights-of-way within thirty-six feet of the property line of a particular RHCF. *See* 512 U.S. at 768-70. *Schenck* upheld an injunction barring protesters from demonstrating within fifteen feet of entrances and driveways of any RHCF in the Western District of New York. 519 U.S. at 366 n.3, 374-76, 380-82.[1] *Hill* upheld a Colorado statute that made it unlawful, within 100 feet of health care facility entrances, to approach closer than eight feet of someone without their consent in order to pass a leaflet, display a sign, or engage in oral protest, education, or counseling. 530 U.S. at 714-35.

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[1] Though *Schenck* involved two different 15-foot buffer zones, Petitioners fail to distinguish them. *Cf.* Pet. 13. The Court upheld "the fixed buffer zones around the doorways, driveways, and driveway entrances," because they "are necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." *Schenck*, 519 U.S. at 380-82. It struck down the "floating" portion of the injunction—which required all protesters to stay at least 15 feet away from any person or vehicle seeking access to or leaving a clinic, no matter where the person or vehicle was located—because "it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction" and thus created a "substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 377-78.

The fixed buffer zone established by the 2007 Act is very similar to the buffer zones that were established by injunction and upheld in *Madsen* and *Schenck*. Since the buffer zone established by the revised Act (with a 35-foot radius around each clinic entrance or driveway) is substantially smaller than the one upheld in *Madsen* (with a 36-foot radius around clinic's entire property line), and since the injunctions in *Madsen* and *Schenck* passed muster under a more stringent standard of review than applies here,[2] it was entirely consistent for the court of appeals to hold that the revised Act is constitutional on its face.

Despite the obvious relevance of this precedent, Petitioners do not mention *Madsen* at all and only cite *Schenck* with respect to the portion of the decision that struck down the floating buffer zone. Pet. 13. By ignoring these decisions affirming fixed buffer zones so similar to the 2007 Act, Petitioners tacitly concede there is no inconsistency between

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[2] If this case involved an injunction that restricts speech, rather than a statute of general application, the lower courts would have been required to apply "a somewhat more stringent application of general First Amendment principles" and determine "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765 (reviewing buffer zone injunction). But since the 2007 Act is a law of general application reflecting "a general policy choice" by the Massachusetts Legislature, the court of appeals correctly assessed the Act "under the constitutional standard set forth in *Ward* [*v. Rock Against Racism*, 491 U.S. 781, 791 (1989)], rather than a more strict standard." *Hill*, 530 U.S. at 731 (reviewing buffer zone statute). *See* Pet. App. 15a-16a.

them and the decision of the court of appeals that would support certiorari review.[3]

Furthermore, the court of appeals' summary of the governing law is also consistent with this Court's precedents. Consistent with *Hill*, the First Circuit ruled that the revised Act falls into the category of "laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur." Pet. App. 9a. Thus, the court of appeals' application of the "intermediate scrutiny" standard that governs whether such time and place regulations violate the Free Speech Clause is consistent with long standing precedent of this Court. *Hill*, 530 U.S. at 731. The First Circuit

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[3] In arguing for rehearing en banc below, Petitioners tried to distinguish *Madsen* and *Schenck* on the ground that they involved "expressly targeted injunctions against repeat lawbreakers." Petitioners' C.A. Pet. for Reh'g and Reh'g En Banc 13. Under this theory, Petitioners told the First Circuit that "this is a case of *first impression* in the federal courts of appeal that tests a law of general application creating a 35-foot fixed buffer zone around abortion clinics. . . ." *Id.* 2 (emphasis added). They argued that "[t]he speech restriction in the Act is *entirely unprecedented*." *Id.* 13 (emphasis added). Since then, a second court of appeals has upheld a similar buffer zone against constitutional challenge. *See Brown v. Pittsburgh*, 586 F.3d 263, 273-76 (3rd Cir. 2009) (upholding statute creating 15-foot buffer zone around entrances to hospitals and health care facilities). The fact that *Madsen* and *Schenck* upheld fixed buffer zones under the more searching standard applicable to injunctions does not make the court of appeals' decision in this case unprecedented. But even if, *arguendo*, Petitioners were correct in arguing below that their challenge to the revised Massachusetts statute raised an issue "of first impression," then the Court should allow the issue to percolate further and wait to see whether a genuine and serious conflict develops among the courts of appeal on an important federal question.

correctly held that "[r]egulations of this type will be upheld as long as 'they are justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information.'" Pet. App. 9a (quoting *Ward*, 491 U.S. at 791).

The statute "does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It merely regulates the places where communications may occur." *Hill*, 530 U.S. at 731. Petitioners remain free to engage in any kind of speech and to offer any type of information they wish, so long as they do not do so within a clearly marked and posted buffer zone during clinic business hours. Pet. App. 19a-20a, 95a-100a. As the district court found:

> [A]s long as Plaintiffs—or anyone for that matter—remain outside the zone, they may freely talk to individuals entering and exiting the RHCFs, as well as people inside the zone. The Act also does nothing to prevent patients from leaving the zone to speak with protesters or counselors. Moreover, individuals may continue to display signs and photographs, hand out literature, talk, pray, chant, sing or engage in any other form of lawful communication or protest outside of the buffer zone. Importantly, most, if not all of this expressive activity, can be seen and heard by people entering and exiting the buffer zone, and also by people inside the buffer zone.

Pet. App. 96a; *accord id.* 19a (court of appeals). Since anyone who wants to speak with or obtain literature from a protester or counselor standing near a buffer zone may do so, the Act does not prevent clinic patients or anyone else from "hear[ing] and receiv[ing] information and offers of alternative assistance." *Cf.* Pet. 27.

In sum, the 2007 Act does not "outlaw[] peaceful handbilling," prohibit "peaceful conversations with willing listeners," or ban any other kind of speech. *Cf.* Pet. 13. Petitioners' "attempt to analogize" the Act "to a total ban on distribution of handbills is imaginative but misguided." *Ward*, 491 U.S. at 799 n.7. *Cf.* Pet. 15.

Petitioners may disagree with the result reached in this case, but that disagreement is based on nothing more than an assertion that the court of appeals misapplied a well-settled rule of law. It would not be appropriate to grant certiorari to review the court of appeals' application "of a properly stated rule of law" to the facts of this particular case. *See* Sup. Ct. R. 10; *accord United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

B. Factual Differences From *Hill* Do Not Warrant Certiorari.

Petitioners and their *amici* have a singular focus on this Court's decision in *Hill v. Colorado*. They argue (wrongly) that the decision below conflicts with *Hill* because the Massachusetts statute at issue here differs from the Colorado statute upheld in that case. Pet. 10, 12-25. Certiorari review is not appropriate merely because the Massachusetts statute was

revised to establish a fixed buffer zone very similar to the injunctions upheld in *Madsen* and *Schenck*, and to delete the floating buffer zone provision that had been modeled on the statute upheld in *Hill*.

1. Elimination of the Restriction on Approaching Unwilling Listeners.

Petitioners incorrectly cite *Hill* for the proposition that the First Amendment bars any time, place, or manner regulation that has the effect of limiting communications with willing listeners in any way. Pet. 7-8, 10-14, 16, 27, 33. Given the nature of the Colorado statute, which under certain circumstances made it unlawful to approach within eight feet of another person without their consent, *Hill* addressed whether "the protection the statute provides for the unwilling listener" violated "the First Amendment rights of the speaker." *See* 530 U.S. at 708. The revised Massachusetts statute no longer has comparable restrictions on approaching listeners without their consent. But that factual difference from *Hill* does not raise any important federal question that would warrant certiorari review.

The Court has repeatedly held that an appropriately tailored law may constitutionally bar protesters from approaching willing and unwilling listeners alike inside a fixed buffer zone, where there is ample opportunity to communicate from outside the zone. *See Schenck*, 519 U.S. at 374-76, 380-82 (15-foot, content-neutral buffer zone around RHCF entrances and driveways); *Madsen*, 512 U.S. at 768-70 (36-foot, content-neutral buffer zone around entire RHCF property); *Burson v. Freeman*, 504 U.S. 191, 210-11 (1992) (plurality opinion upholding content-

based statute that bars solicitation of votes and display of campaign materials within 100 feet of polling place); *id.* at 214-16 (Scalia, J., concurring on ground that statute was reasonable, viewpoint-neutral regulation of nonpublic forum).

The 2007 Act allows Petitioners to approach whomever they want, as closely as they want, and for any lawful purpose, so long as they do so outside the buffer zone. Pet. App. 19a, 96a. It also lets Petitioners invite clinic patients to approach them to receive handbills, to converse, or for any other reason. *Id.* "Any willing listener is at liberty to leave the zone, approach those outside it, and request more information." *Id.* 19a. That Petitioners may not approach either willing or unwilling listeners within the buffer zone does not mean that the decision below conflicts with *Hill* or that it raises any unsettled issue that would merit certiorari review. *Cf. Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 n.12 (1981) (rule barring distribution of literature at state fair except from fixed locations was valid time, place, and manner restriction, even though "it prefers listener-initiated exchanges to those originating with the speaker").

2. "Normal Conversational Distance."

Nor did *Hill* recognize any absolute constitutional right to communicate with an unwilling listener from a "normal conversational distance" at all times or in all places within a public forum Pet. 4-5, 8-9, 12-13, 15-16. It is true that *Hill* upheld Colorado's unusual 8-foot limit on unwelcome approaches within 100 feet of clinic entrances in part because it did not interfere

with normal conversation. *Hill*, 530 U.S. at 726-27. But *Schenck*, *Madsen*, and *Burson* all upheld fixed buffer zones (with radii of 15 feet, 36 feet, and 100 feet, respectively) that had the effect of limiting normal conversation within the zone.

The court of appeals' decision below is consistent with more than 70 years of the Court's precedent regarding restrictions on the time, place, or manner of engaging in communicative activities on public sidewalks or streets. "This Court has long recognized the validity of reasonable time, place, and manner regulations on [a public] forum so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication." *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (citing, inter alia, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941)); *accord Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing, inter alia, *Schneider v. New Jersey*, 308 U.S. 147 (1939)).

The principle that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired" has always been a central element of Free Speech Clause precedent. *Heffron*, 452 U.S. at 647 (upholding state fair rule barring sale or distribution of materials, including leaflets and literature, except from fixed location); *accord Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (upholding ordinance prohibiting posting of signs on public property); *Adderley v. Florida*, 385 U.S. 39, 48 (1966)

(upholding conviction for criminal trespass of protesters blocking jail driveway).

Indeed, from the beginning of modern Free Speech Clause jurisprudence almost a century ago, the Court has made clear that legislatures may restrict the time, place, or manner of speech in order to protect the public health, safety, or convenience. *See, e.g.*, *Cox*, 312 U.S. at 576 (holding that States may regulate "time, place and manner" of using public fora to protect public safety and convenience, and thus may require permit to use public streets for parade); *Schneider*, 308 U.S. at 160 (noting that States "may lawfully regulate the conduct of those using the streets" in order to keep streets and sidewalks open to traffic and pedestrians); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

"[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but ... it need not be the least restrictive or least intrusive means of doing so." *Hill*, 530 U.S. at 726 n.32 (quoting *Ward*, 491 U.S. at 798). Petitioners conceded below that "the fixed buffer statute was designed to protect the health and safety of women seeking reproductive health care services" and to "clear out the bottleneck ... immediately adjacent to the doors and to the driveways [of clinics]," and that these are both "legitimate interest[s]." Pet. App. 88a. The revised Massachusetts buffer zone was narrowly tailored to serve those interests, just like the much larger buffer

zone upheld in *Madsen*, 512 U.S. at 768-70. Because the Act protects only the clinic entrances and driveways where there was a history of physical obstruction, close-quarter confrontations, and other public safety problems, it does not burden substantially more speech than necessary. Pet. App. 16a-17a, 20a, 89a-91a.

The court of appeals correctly respected the Legislature's conclusion that the revised Act was necessary to protect public safety and clinic access. Pet. App. 16a-17a; *accord Ward*, 491 U.S. at 800. When evaluating whether a content-neutral statute is narrowly tailored to further legitimate interests, a court is "not at liberty to substitute [its] judgment for the reasonable conclusion of a legislative body." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 520 U.S. 180, 212 (1997). It would similarly be "constitutionally unwarranted" for a court to reject the Legislature's conclusions regarding the threat to public safety at clinic entrances on the ground that they were not supported by sufficient fact finding. *Id.*, 520 U.S. at 213. A Legislature "is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Id.*

3. Application to Clinics.

Petitioners now argue that, because the Act was narrowly tailored to apply only outside RHCFs, it is an "abortion-specific" restriction. Pet. 4, 10. They made the opposite argument below, however, asserting that the Act is unconstitutionally overbroad because it "reaches not only the abortion-

related speech of McCullen" but has the same effect on all kinds of speech regardless of its content. Petitioners' C.A. Br. 35; *accord* Pet. App. 22a, 102a. Petitioners' about-face underscores that the geographic scope of the Act's application raises no unresolved and important federal question.

The mere fact that the statute in *Hill* applied to all medical facilities, while the Massachusetts statute applies only to RHCFs where abortions are offered or performed, does not mean that the court of appeals' decision "conflicts with *Hill's* content-neutrality analysis." Pet. 17-19. A legislature may ensure that a content-neutral time, place, or manner restriction is narrowly tailored by confining its application to "the place where the restriction is most needed." *Hill*, 530 U.S. at 730. That is what the Massachusetts Legislature did here.

The revised Act safeguards RHCF entrances and driveways because that is where protesters regularly undermined public safety and threatened and intimidated patients and staff. Pet. App. 17a, 43a-64a. "As described above, the [Legislature's] investigation demonstrated that there was still a significant public safety and patient access problem in the areas immediately adjacent to RHCF entrances and driveways." Pet. App. 75a. The legislative record is "replete with factual references to specific incidents and patterns of problematic behavior around RHCFs." *Id.* 12a, 78a. But nothing in the record supports Petitioners' suggestion that there have been similar problems outside medical facilities "at thousands of other locations" that are not covered by the Act. *Cf.* Pet. 19.

Petitioners' argument that the revised Act is too narrowly tailored echoes one rejected in *Hill*. There, the Court rejected an assertion that the Colorado statute failed to meet the test of content-neutrality because it protected only the entrances of medical facilities and did not apply more broadly, and held that a time, place, or manner regulation is not "unconstitutionally content based" merely because it applies to specific locations and not others. *Hill*, 530 U.S. at 724. For example, "[a] statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports...." *Id.* Similarly, the Massachusetts statute is not content-based merely because it applies to RHCFs and not other medical facilities. Pet. App. 76a; *McGuire I*, 260 F.3d at 44.

The petition misapprehends the constitutional test for content-neutrality. "Government regulation of expressive activity is content neutral so long as it is *'justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (emphasis in original) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *accord Hill*, 530 U.S. at 720; *Madsen*, 512 U.S. at 763. In this case, "[t]he Act is justified by 'conventional objectives of the state's police power—promoting public health, preserving personal security, and affording safe access to medical services,' without *any* reference to content." Pet. App. 75a (emphasis in original) (quoting *McGuire I*, 260 F.3d at 44); *see also* Pet. App. 10a.

"A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it

has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791. Because the Act is content neutral on its face and serves content-neutral purposes, it is content neutral whether or not it tends to impose greater burdens on "the speech of antiabortion protesters," *Madsen*, 512 U.S. at 762-63, and even if it was passed to solve problems created by "the conduct of the partisans on one side of a debate," *Hill*, 530 U.S. at 724-25. "The statute is not limited to those who oppose abortion. It applies ... to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands." *Id.* at 725.

In sum, the fact that the 2007 Act applies to RHCFs and not all medical facilities does not create any conflict between the decision below and *Hill*.

4. Clinic Employee Exemption.

The statutory exemption for clinic "employees or agents ... acting within the scope of their employment" (Pet. App. 125a) does not conflict with *Hill* either. *Cf.* Pet. 20-25. This exemption furthers the legislative goal of ensuring safe access to RHCFs. The legislative history of the original Act shows that "clinic employees often assist in protecting patients and ensuring their safe passage as they approach RHCFs," including protecting them from "physical altercations" with protesters. *McGuire I*, 260 F.3d at 46 (cited at Pet. App. 13a). "As the record reflects, the same is true today." Pet. App. 81a.

The exemption for clinic employees acting within the scope of their employment does not "grant special

speech rights to speakers from abortion clinics." *Cf.* Pet. 20. "On its face, the statute does not permit advocacy of any kind in the zone. Moreover, the Attorney General's enforcement position expressly and unequivocally prohibits any advocacy by employees and agents of the RHCF's in the buffer zone." Pet. App. 83a. The Massachusetts Attorney General informed law enforcement personnel that this exemption only allows "clinic personnel to assist in protecting patients and ensuring their safe access to clinics," and does not allow them to engage in the sort of pro-choice speech or advocacy that Petitioners say would destroy the Act's viewpoint neutrality. *Id.* 64a-65a. On its face, this limited exemption does not turn the statute into a viewpoint-based regulation of speech. Pet. App. 13a; 78a-84a; *McGuire I*, 260 F.3d at 45-47; *McGuire II*, 386 F.3d at 52 & n.1, 64.

The Third Circuit reached the same conclusion regarding a very similar exemption in a local buffer zone ordinance. *See Brown v. Pittsburgh*, 586 F.3d 263, 273-76 (3rd Cir. 2009). *Brown* concerned a Pittsburgh ordinance that establishes a 15-foot buffer zone around entrances to hospitals and health care facilities. 586 F.3d at 266. The ordinance exempts "authorized security personnel employees or agents of the hospital, medical office, or clinic engaged in assisting patients and other persons to enter or exit the hospital, medical office, or clinic." *Id.* at 273-74. The City construed the exemption as only applying where clinic employees or agents are actually engaged in providing such assistance, and as not allowing any person in the buffer zone to engage in "demonstrations or oral protest, education, or counseling with other individuals, including patients or other protesters." *Id.* at 274. The Third

Circuit held that, especially with this construction of the exemption, the buffer zone provision is content-neutral on its face. *Id.* at 274-75.

The finding below that the clinic employee exemption is viewpoint neutral on its face does not conflict with *Hill*, where no similar issue was present. And it is consistent with *Madsen*, which held that an injunction that applied a buffer zone only against anti-abortion protesters, but not against clinic employees, agents, or anyone else, was not viewpoint based. 512 U.S. at 762-63.

If Petitioners were able to show that police let clinic agents engage in pro-choice advocacy from within a buffer zone, they could press the issue in their as-applied claim. But a facially-neutral provision that merely allows clinic staff to greet patients and make sure that they can enter an RHCF safely does not conflict with *Hill* or otherwise raise an important federal question that must be resolved at this time.

In any case, this supposed defect in the Act does not call into question the statute as a whole and therefore provides no basis for granting certiorari. It could be cured by eliminating this exemption and allowing clinic employees to do their job by standing outside the buffer zone and then escorting patients into the clinic. (Petitioners never challenged the separate exemption for persons "entering or leaving" an RHCF. Pet. App. 125a.) Under Massachusetts law, "[t]he provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof." Mass. G.L.

c. 4, § 6, clause Eleventh. Whether the court of appeals erred in declining to strike this exemption from the Act does not raise an important federal question that merits certiorari review.

5. Petitioners Waived the Overbreadth Claim in the Petition.

Petitioners now argue that the Act is overbroad because people could inadvertently violate the law while merely passing through the buffer zone on their way to a destination other than the clinic. Pet. 16-17. Petitioners waived this point, however, by failing to raise it "either in the district court or in [their] briefs on appeal." Pet. App. 22a-23a. Because this issue arose for the first time at oral argument on appeal, the court of appeals did not decide it. *Id.*[4] This Court should not grant certiorari review to consider an issue that was waived and not decided below.

Even if this issue had not been waived, it would not merit further review because "it seems likely that the alleged overbreadth is not sufficiently sprawling to serve as the foundation for a constitutional challenge." *Id.* 24a. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers*

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[4] Although Petitioners argued below that the Act is overbroad because the restriction on remaining within the buffer zone reaches not only abortion-related speech but also other expressive activity (Pet. App. 20a-22a; Petr's C.A. Opening Br. 34-38), they did not argue that the scope of the exception for persons passing through the buffer zone renders the Act overbroad until oral argument before the First Circuit (Pet. App. 23a n.3).

for Vincent, 466 U.S. at 800. "[P]articularly where conduct and not merely speech is involved, ... the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Hill*, 530 U.S. at 732 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *accord Virginia v. Hicks*, 539 U.S. 113, 121-23 (2003).

The court of appeals correctly rejected Petitioners' further suggestion that to avoid overbreadth the buffer zone "should have been limited to abortion-related speech." Pet. App. 22a. That the Act "burdens all speakers" is "a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Hill*, 530 U.S. at 730-31. It does not make the Act overbroad. *Id.* at 732. "If a failure to distinguish among speakers in itself gave rise to overbreadth problems, legislatures would be forced to choose between passing laws that were not content-neutral or laws that were overbroad." Pet. App. 22a.

C. This Case Is Not a Vehicle For Revisiting *Hill*.

The Court should also reject Petitioners' invitation to take this case in order to revisit and overrule *Hill*. Pet. 25-28. There is no reason to reconsider *Hill* and, in any event, this case provides no vehicle for taking a second look at *Hill*.

The Court's decision in *Hill* elicited strong dissents and subsequent criticism focused primarily on two issues: whether legislatures may provide special protection for unwilling listeners in public fora without violating the First Amendment, and

whether the Colorado statute was content-based because it restricts certain kinds of communications but not others.

Neither of those issues is raised here. While the 2000 Act was modeled on the *Hill* statute, the 2007 Act substitutes a fixed buffer zone that excludes all non-exempt individuals from a clearly marked and posted buffer zone, without regard to whether they are engaged in any particular kind of speech or communicative activity.

The question that prompted the Court to grant certiorari in *Hill* was "whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener." 530 U.S. at 708. The Colorado statute was crafted "to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range" anywhere within 100 feet of a health care facility entrance. *Id.* at 718 n.24. The *Hill* dissenters argued that the Colorado statute was therefore unconstitutional, because the First Amendment generally requires that people must tolerate unwelcome speech in public fora. *Hill*, 530 U.S. at 749-50 (Scalia, J., dissenting, with Thomas, J.) and 771-72 (Kennedy, J., dissenting). The majority disagreed, holding that the Colorado statute legitimately seeks to protect the "right to be let alone" as well as the right of "passage without obstruction," in the particular context of patients seeking access to health care facilities. *Id.* at 714-18. But this case provides no opportunity to reconsider the extent to which the First Amendment may limit

States' ability to restrict approaches toward unwilling listeners, because the floating buffer provision modeled on the Colorado statute has been deleted from the Massachusetts law.

The *Hill* dissenters also argued that the Colorado statute was content-based because it did not subject all speakers to the floating buffer zone, but instead only constrained messages of "protest, education, or counseling." *See Hill*, 530 U.S. at 742-749 (Scalia, J., dissenting, with Thomas, J.), and at 765-770 (Kennedy, J., dissenting). The majority again disagreed, holding that this aspect of the Colorado law did not make the statute content-based. *Id.* at 720-25. But this provision has also been deleted from the Massachusetts statute, which applies equally to all forms of speech, all speakers, and all viewpoints. Thus, this case provides no occasion to reconsider whether time, place, or manner restrictions may be applied to communications undertaken for particular purposes.

Nor does this case provide any opportunity to decide whether *Hill* "should be reconsidered as being in conflict with *United States v. Grace*, 461 U.S. 171 (1983), [or] *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972)," as the court of appeals' decision was consistent with both *Grace* and *Mosley*. *Cf.* Pet. 27.

Grace struck down a federal statute that imposed a "total ban on carrying a flag, banner or device on the public sidewalks" surrounding the Supreme Court Building. 461 U.S. at 182. But the Court made clear that "those sidewalks, like other sidewalks, [remain] subject to reasonable time, place and manner restrictions." *Id.* at 183-84. The total

ban was held not to be a reasonable "place" restriction because there was no indication that it was tailored to remedy conduct that had, for example, "obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds." *Id.* at 180-82. Here, in contrast, the Massachusetts statute does not impose a total ban on speech, but instead was specifically aimed at solving actual interference with clinic access and threats to public safety immediately next to RHCF entrances.

Mosley struck down an ordinance that banned most picketing outside of schools, but allowed peaceful labor picketing. Because it restricted certain speech based on its subject matter, it violated the Equal Protection Clause. 408 U.S. at 95-96. The Court stressed, however, that it has "continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests," and that "the State may have a legitimate interest in prohibiting some picketing to protect public order." *Id.* at 98. Here, the Massachusetts statute is a permissible "time" and "place" regulation that applies equally to all protestors, regardless of the content of their speech or the viewpoint they wish to express.

II. There Is No Conflict with Other Circuits.

The First Amendment precedent governing laws that have the effect of restricting the time, place, or manner of speech activities is well-settled. The Petition confirms that lower courts have not had great difficulty in applying it. Lower courts strike

down broad limitations on speech that are not narrowly tailored to serve legitimate interests, and strike down complete bans on speech. There is no confusion about an important federal question that could be resolved by certiorari review in this case.

A. Petitioners Identify No Conflict With Other Buffer Zone Cases.

The one other court of appeals decision concerning a similar statute is consistent with the First Circuit's decision in this case. *See Brown*, 586 F.3d at 273-76 (upholding 15-foot buffer zone around hospital and clinic entrances). Petitioners do not identify any true conflict between the decision below and decisions of other courts of appeals that would warrant certiorari review.

The portion of *Berger v. Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), cited by Petitioners involved very broad restrictions on speech that are quite different from this case. *Cf.* Pet. 28-29. *Berger* invalidated a rule adopted at the Seattle Center—an "80-acre expanse of public space" that is home to the Space Needle, museums, sports arenas, theaters, a performance hall, and 23-acres of public parks—that prohibited all "speech activities" within thirty feet of a "captive audience," defined as any person waiting in line to obtain goods or services or attend any event, in an audience at an event, or seated where food or drinks are consumed. *Id.* at 1035, 1053-57 (striking down "Rule G.4"). As is clear from *Berger*, however, such a broad ban on speech has little in common with the narrow buffer zone statute at issue here. First, the Ninth Circuit also held that a separate rule restricting street performers to sixteen

designated locations was not unconstitutional on its face, as it addressed a "significant problem" caused by "street performers blocking entranceways and egresses" and there was a disputed issue of material fact—that the district court was directed to decide on remand—as to whether that rule leaves open ample alternative channels for communication. *Id.* at 1048-50 (addressing "Rule F.5"). Second, in explaining why the broad "captive audience" rule did not serve a legitimate governmental purpose, the Ninth Circuit distinguished *Madsen*, *Schenck*, and *Hill* on the ground that the Seattle rule did not protect the "unique privacy and self-determination interests involved in protecting medical facilities." *Id.* at 1054-55. In sum, there is no reason to assume that the Ninth Circuit, faced with facts similar to those here, would reach a result different from the First Circuit's decision below.

In *Phelps-Roper*, the Eighth Circuit did "not decide the merits of Phelps-Roper's claim" that a statute barring picketing near a funeral procession or location violated the Free Speech Clause. *Phelps-Roper v. Nixon*, 545 F.3d 685, 692 (8th Cir. 2008), *reh'g and reh'g en banc denied*, 545 F.3d 685 (8th Cir.), *cert. denied*, 129 S.Ct. 2865 (2009); *cf.* Pet. 29-30.[5] The court held "only that Phelps-Roper is entitled to a preliminary injunction while the constitutionality of [the statute] is thoroughly reviewed" by the district court. *Id.* at 694. It did so in part because the challenged statute, in its application to funeral processions, created "'floating' buffer-zones [that] provide citizens with no guidance

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[5] Petitioners' notation that *Phelps-Roper* was decided *en banc* is incorrect. Pet. 29. The Eighth Circuit denied *en banc* review, over the dissent of five judges. *See* 545 F.3d at 685.

as to what locations will be protest and picket-free zones and at what times." *Id.* at 693. The court emphasized that it was "only reviewing the propriety of a preliminary injunction, not determining the constitutionality of the statute." *Id.* at 688 n.1, 694. In this posture, *Phelps-Roper* did not decide any important federal question in a way that conflicts with the First Circuit decision upholding the Massachusetts fixed buffer-zone statute.

Finally, Petitioners assert that the decision below conflicts with an unpublished and unappealed district court decision regarding a local ordinance creating a 20-foot buffer zone outside medical facilities,[6] and with another unappealed district court decision regarding a state law creating a 300-foot buffer zone around funerals.[7] Pet. 30-31. A purported conflict between the court of appeals' decision below and a district court decision is not a basis for this Court to grant a writ of certiorari. *See* Sup. Ct. R. 10.

B. Cases Involving "Complete Bans on Speech" Are Distinguishable.

Petitioners note that other courts of appeals have struck down "complete bans on speech in public forums," consistent with *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). Pet. 11-12. *Jews for Jesus* struck down as "substantially overbroad" a resolution that barred all "First Amendment

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[6] *Halfpap v. City of West Palm Beach*, 2006 WL 5700261, *24 (S.D. Fla. 2006).

[7] *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 996-96 (E.D. Ky. 2006).

activities" within the Central Terminal Area at Los Angeles International Airport. 482 U.S. at 570, 577. In contrast, the Massachusetts statute is not a complete ban on speech. The court of appeals explained that:

> The matter at hand is readily distinguishable from *Jews for Jesus*. That case involved a direct ban on First Amendment activity, whereas this case involves a time, place, and manner restriction. The Court has left no doubt but that time-place-manner restrictions should not be analyzed in the same way as direct bans on speech.

Pet. App. 21a (citing *Hill*, 530 U.S. at 731); *accord, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) ("complete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information" and thus warrant more stringent review (citation omitted)).

The decisions cited by Petitioners do not conflict with the court of appeals' holding. *Cf.* Pet. 32. That other courts of appeals have reached varying results in materially different circumstances does not mean there is any conflict on an important federal question. *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931) ("It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted.").

As shown at pages 29-30 above, *Berger* struck down a very broad speech restriction that differed materially from the narrow buffer zone at issue here.

Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005), held that trespass notices prohibiting plaintiff's "presence in and around certain state courthouses" in Vermont violated his First Amendment rights of access to court proceedings and free expression. *Id.* at 58, 79-93. The Second Circuit emphasized that "[t]he defendants' singling out of Huminski for exclusion, thereby permitting all others to engage in similar activity in and around the courts, suggests to us that the trespass notices are not reasonable." *Id.* at 92. But it distinguished the case from one involving a "generally applicable" statute limiting access to particular areas. *Id.*

Parks v. Finan, 385 F.3d 694 (6th Cir. 2004), concerned a rule requiring a permit before using any part of the 10-acre grounds that surround the Ohio state capitol buildings for speeches or public gatherings. *Id.* at 696. The Sixth Circuit upheld the rule as applied to groups, but affirmed an injunction against applying the rule to individuals because doing so was "not sufficiently narrowly tailored to the interests [identified by defendants] of protecting property, promoting safety, and permitting others to speak." *Id.* at 704. But the court "emphasize[d] the limited nature of our holding," and clarified that "the injunction does not prevent [defendants] from modifying [the] regulations to require a prior permit for certain types of individual conduct, albeit expressive, that may more directly implicate concerns of public order or safety." *Id.* at 706. In contrast to *Parks*, the Massachusetts statute was

narrowly tailored to address specific public safety concerns. Pet. App. 10a, 14a-15a, 17a, 26a, 86a-91a.

Finally, *First Unitarian Church* involved "the prohibition of expressive activity by Salt Lake City on a public pedestrian easement retained by the City" after it closed part of Main Street to automobile traffic and sold it to the Church of Jesus Christ of Latter-Day Saints. *See First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1117 (10th Cir. 2002), *cert. denied sub nom., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. First Unitarian Church*, 539 U.S. 941 (2003). The Tenth Circuit held that the land subject to the easement remained a public forum, and that prohibiting all expressive activity in the easement violated the First Amendment. *Id.* at 1121-33. But it made clear that the city could "enact reasonable time, place, and manner restrictions" on use of the easement in order to protect "public safety, accommodate[e] competing uses of the easement, control[] the level and times of noise, and [further] similar interests." *Id.* at 1132. That is exactly what the Massachusetts Legislature has done.

In sum, there is no reason to assume that the Second, Sixth, Ninth, or Tenth Circuits would reach a result different from the First Circuit's decision below if faced with facts similar to those here.

III. The Interlocutory Posture of the Case Weighs Against this Court's Review.

The district court stayed all proceedings regarding Petitioners' claim that the 2007 Act is unconstitutional as applied. Pet 8 n.3. Respondent

has not yet been able to conduct discovery, present a full case, or cross-examine Petitioners and any other witnesses they may present. The district court noted that it did "not have a complete record from which to make ... findings" regarding the actual effects of the revised Act. Pet. App. 33a. The court of appeals' decision is thus interlocutory, "a fact that of itself alone furnishe[s] sufficient ground for the denial of" the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

The petition focuses on questions that will have to be answered when the district court determines whether the revised Act is constitutional as applied. Petitioners argue that the current Massachusetts statute may not leave open adequate alternative channels of communication, and that the exception for clinic employees and agents may be enforced in a manner that renders the statute viewpoint-based. Pet. 8 n.3, 12-17, 20-25. The district court made clear that these claims will be decided during the as-applied challenge; it did not address them in connection with the facial challenge at issue here. Pet. App. 83a n.180, 95a n.217, 96a n.220. It would not be appropriate for the Court to review these questions without the benefit of fact finding based on a full evidentiary record.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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v.

MARTHA COAKLEY,
ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

For nearly a decade, Massachusetts defended its abortion-clinic buffer zones as just like the one held facially constitutional in *Hill* v. *Colorado*, 530 U.S. 703 (2000). The result has been three First Circuit decisions upholding unconstitutional speech restrictions on the basis of expansive interpretations of *Hill*. *See McGuire* v. *Reilly*, 260 F.3d 36 (1st Cir. 2001) (*McGuire I*); *McGuire* v. *Reilly*, 386 F.3d 45 (1st Cir. 2004) (*McGuire II*), and *McCullen* v. *Coakley*, 571 F.3d 167 (1st Cir. 2009). Other courts have reached various conclusions about *Hill*'s impact on First Amendment prin-

ciples, with some following the First Circuit's erroneous interpretation. *See* Pet. 15, 26 n.11, 28-32.

Respondent now (i) concedes that the Act is quite different and more restrictive than the statute in *Hill* and therefore requires the application of injunction cases like *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994), and *Schenck* v. *Pro-Choice Network of Western New York, Inc.*, 519 U.S. 357, (1997), *see* Respondent's Brief in Opposition ("BIO") 8-11, 25-28, and (ii) argues that the "varying results" in other courts stem not from confusion about the reach of *Hill*, but rather from application of "well-settled" law that "lower courts have not had great difficulty in applying." BIO 28, 32.

These arguments fail. The Act's differences from *Hill*—its focus on abortion, its speaker exemptions, and its criminalization of even peaceful, welcomed speech on the public sidewalk—eviscerate the fundamental protections upon which *Hill* relied. And injunction cases like *Madsen* and *Schenk*—which involved restrictions tailored to specific individuals who had violated the law—are not blueprints for broadly applicable speech restrictions. Whether *Hill* allows government to selectively criminalize even welcome speech on the public sidewalk is an issue of paramount First Amendment importance. The Court should not wait until Petitioners are arrested to address that issue. Nor should it permit their rights to continue to be irreparably harmed while they are forced to pursue unnecessary as-applied litigation. Petitioners' facial challenge was litigated to its conclusion and comes to this Court with a 300-page trial record. Certiorari is appropriate now.

I. RESPONDENT'S ABOUT-FACE ON *HILL* DEMONSTRATES WHY CERTIORARI IS WARRANTED

A. Conflict With *Hill*

Petitioners agree with Respondent's new position that the Act is very different from the statute upheld in *Hill*. BIO 25-28. As set forth in detail in the Petition at 12-25, the Act lacks *Hill*'s critical safeguards of application at a broad range of health care facilities, application to all speakers, and limitation to *unwanted approaches* so as to permit, for example, effective leafleting and conversation with willing listeners.

These distinctions are of great importance. They provided the very basis for the decision in *Hill*. *See, e.g.*, 530 U.S. at 707-709, 727-728 (emphasizing distinction between willing and unwilling listeners); *id.* at 708, 723-724 (equal application to all speakers); *id.* at 715, 728-729 (application at all medical facilities rather than a subset); *id.* at 726-727 (preservation of normal conversational distance); *id.* (ability to stand still and leaflet, talk, or display signs).

Certiorari is appropriate because both lower courts—and other courts that have relied on them—ignored these crucial differences and relied on *Hill* to uphold the Act. And until last week Respondent eagerly urged them to do so. For example, Respondent originally argued that the Act modified "only the size and nature of the buffer zone ... [but in] all other respects ... remained identical" to the no-approach laws. Dist. Ct. Opp. to Prelim. Inj. 1-2. In fact, that first brief refers to the *Hill* and *McGuire* cases more than 90 times. Both lower courts ruled for Respondent by relying heavily on *Hill*. *See, e.g.*, Pet. App. 10a, 18a.

Now that Respondent concedes the Act is *not* "modeled on the *Hill* statute" (BIO 26), certiorari is

warranted to make clear that *Hill* does not support severe restrictions on speech.

B. Speaker Discrimination

Respondent acknowledges *Hill*'s statement that the Constitution "demands" that public forum speech restrictions apply to all speakers "whether they oppose or support" abortion. BIO 21. Yet Respondent defends the Act's facial exemption for abortion clinic speakers by promising to prosecute exempted speakers if they discuss "abortion" or "partisan" issues. Pet. App. 14a, 27a, 64a-67a. This attempt fails.

First, Respondent effectively concedes facial unconstitutionality by nowhere defending the statute as written. The legislature provided, without qualification, that clinic speakers were fully exempt if "acting within the scope of their employment." Pet. App. 125a. Granting clinic speakers public forum speech rights denied to others is unconstitutional (*see* Pet. 20-21), and Respondent presents no argument otherwise.[1]

Moreover, Respondent offers no authority for the proposition that she may constitutionally *broaden* a statute and hold exempted speakers criminally liable. Any clinic speakers actually prosecuted for violating Respondent's interpretation have been provided an absolute defense by the Act itself. In any case, this sleight of hand is expressly content-based—only speech

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[1] Respondent incorrectly suggests that Petitioners conceded the asserted legislative interests. BIO 7. Petitioners actually said the exact opposite: that they "assume[] but do[] not concede" validity of the asserted rationale and did so "[b]ased on the holding of *McGuire I*." Appellants' C.A. Br. 37; Dist. Ct. Mem. in Supp. of Prelim. Inj. 34; *see also* Pet. App. 10a.

on specified topics (abortion and "partisan issues") is criminal—and discriminatory. *See* Pet. 22-23 n.8 (noting clinic speakers would still be permitted to say to women "Follow me, I can help you" while Petitioners could be imprisoned for saying same).

Finally, the Court's recent decision in *Citizens United* v. *Federal Elections Commission*, No. 08-250, 2010 WL 183856 (U.S. Jan. 21, 2010), confirms that such speaker distinctions are prohibited. *Id.* at *19 (government may not "tak[e] the right to speak from some and giv[e] it to others," or "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.").

That the lower courts here permitted speaker distinctions—and did so using an essentially rational basis standard (*see* Pet. 22-25 & n.10)—warrants review by this Court.

C. *Madsen*, *Schenck*, And *Burson* Are Inapposite

Realizing that *Hill* cannot support the Act, Respondent seeks refuge in *Madsen*, *Schenck*, and *Burson* v. *Freeman*, 504 U.S. 191 (1992). However, *Madsen* and *Schenck* are largely inapposite because they concern targeted equitable relief on "extraordinary" records to prevent specific prior lawbreakers from future violations. *See Schenck*, 519 U.S. at 380-383; *Madsen*, 512 U.S. at 766 n.3.

Respondent seizes on language in *Madsen* suggesting that injunctions, because of their targeted nature, require greater scrutiny than statutes to guard against impermissible discrimination. BIO 10. Respondent (along with the First and Third Circuits) suggests that this means that any speech restriction is necessarily permissible if it is less onerous than one approved for

injunction against specific past violators. *Id.*; *see also Brown* v. *City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009) (fifteen foot zone "a fortiori" permissible as a statute because of *Madsen* and *Schenck* ... "This conclusion is bolstered by the First Circuit's recent decision in *McCullen*[.]").

Respondent significantly over-reads *Madsen* and *Schenck*. Simply because courts are particularly cautious about speech-restrictive injunctions does not mean that any restriction a court could constitutionally tailor to an individual is, *ipso facto*, a permissible statutory restriction against all citizens. Indeed, if Respondent's analysis were correct, statutes requiring all speakers to remain at least 100 feet away from actress Halle Berry, and at least ten feet from all Church of Scientology buildings, would also be *a fortiori* constitutional because injunctions against particular individuals have issued with those terms. *See* AP, *Celebrity Obsession*, Chicago Trib., Mar. 8, 2005, *available at* 2005 WLNR 23471400; Sommer, *Scientology Opponent Faces Battery Charge*, Tampa Trib., Jan. 15, 2000, *available at* 2000 WLNR 67940. Similarly, *Hill* would have been an open-and-shut case unworthy of certiorari review because its 8-foot separation zone is far less than the 36 feet approved in *Madsen*. *Madsen* requires no such result. *Cf. Madsen*, 512 U.S. at 778 (Stevens, J., concurring and dissenting in part) (noting, presumably under standard undisputed time-place-manner analysis for statutes, that "a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment.")

Burson, on the other hand, concerned a restriction at polling places that advanced "compelling interests in preventing voter intimidation and election fraud." 504 U.S. at 210-211. No one has suggested the Act serves

any compelling interest. Moreover, the law in *Burson* was even-handed and not viewpoint-based like the Act: it did not focus on ballot questions only about particular issues, and applied equally to anyone campaigning or soliciting votes, *id.* at 193-194, without exceptions for preferred speakers.

In the end, Respondent remains unable to cite a single case from this Court approving a statute remotely like the one it now defends.

II. CERTIORARI IS APPROPRIATE NOW TO RULE ON THE ACT'S FACIAL UNCONSTITUTIONALITY UNDER THE FIRST AMENDMENT

Citing only a single 90-year-old non-constitutional trademark case, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916), Respondent contends that the stay of plaintiffs' as-applied challenge is sufficient reason to deny this petition. BIO 35. This is not the rule in the First Amendment context. *See, e.g., Schenck*, 519 U.S. at 370-371; *McCreary County* v. *ACLU*, 545 U.S. 844 (2005); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004).[2] This Court has repeatedly held—in authority that Respondent fails to address—that the "loss of First Amendment freedoms even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373-374 (1976). Accordingly, the Court has permitted "determination of the invalidity of ... statutes without regard to the permis-

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[2] *See also* Gressman, et al., *Supreme Court Practice* 282 (9th ed. 2007) ("[T]he interlocutory status of the case may be of no impediment to certiorari where the opinion of the Court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation.").

sibility of some regulation on the facts of particular cases" in order to "avoid[] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-487 (1965).

Despite Respondent's repeated invocation of the term "interlocutory," Petitioners' case is interlocutory only in the sense that Petitioners included an as-applied challenge in the same complaint as their facial challenge. The mere fact that Petitioners combined these two challenges in one action—instead of filing an as-applied claim separately if necessary after the facial challenge—does not change the substance of the claim before this Court. Petitioners' facial challenge was the subject of a complete bench trial with a 300-page trial record, resulting in detailed findings of fact (*see, e.g.*, Pet. App. 43a-67a) and final decisions by the courts below.

The validity of this Act turns on questions that are properly addressed as part of a facial challenge. Whether a speech restriction is content-based, narrowly tailored to a sufficiently important governmental interest, leaves open ample alternatives, or is overbroad are all questions that courts address as part of a facial challenge. *See, e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973).[3] This Court has repeatedly

[3] Respondent asserts that Petitioners waived certain arguments within an overbreadth claim that was otherwise presented. BIO 24 n.4. No waiver occurred. *Compare, e.g.*, Appellants' C.A. Br. 34-38 (arguing that the law is overbroad because it outlaws even t-shirts and buttons with abortion or partisan messages) with Pet. App. 116a (Act prohibits even passersby from wearing shirts "with abortion-related or partisan messages").

addressed facial First Amendment challenges with less than the complete trial record here provided. *See, e.g., Hill*, 530 U.S at 709-710 (deciding facial validity based on summary judgment record); *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (deciding facial validity based on stipulated record small enough to be produced entirely as an eight-page appendix to the district court opinion at 661 F. Supp. 1223, 1226-1234).

Here, granting certiorari at this time would protect core First Amendment freedoms and serve judicial economy by avoiding an entirely unnecessary as-applied challenge.

III. The Circuit Conflicts Present Important Federal Questions Needing Resolution

While acknowledging that courts "have reached varying results" on key First Amendment issues, Respondent focuses almost exclusively on alleged factual differences and ignores the different legal analyses performed by different circuits. *See, e.g.*, BIO 32. For example, Respondent argues that the Ninth Circuit's decision in *Berger* v. *Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), has no relevance here because the case did not involve "substantial privacy interests" associated with medical procedures. BIO 30. But the Ninth Circuit's legal analysis was not so limited: the Ninth Circuit held that even if the City's interest in a 30-foot buffer zone had been substantial, the law was still not

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In any case, Respondent concedes that Petitioners presented an overbreadth claim. *See, e.g.*, BIO 24 n.4. Under *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992), Petitioners are free to present any argument in support of that claim. *Id.*

sufficiently tailored because it was biased in favor of certain speakers, *id.* at 1055, and impermissibly overbroad by "prohibit[ing] both welcome and unwelcome communications, both verbal tirades and silent protests, both offensive language and the mildest remark," *id.* at 1056; *see also id.* ("No governmental interest ... could justify such a sweeping ban."). The First Circuit's analysis here could not be more different, breezily rejecting Petitioners' challenge even though the Act is similarly biased in favor of certain speakers and broadly prohibits *all* speech no matter how welcome or inoffensive.

Likewise, the Second, Sixth, Ninth and Tenth Circuits have analyzed complete speech bans at particular locations as impermissible under *Jews for Jesus*, while the First Circuit expressly rejected *Jews for Jesus* and followed *Hill* simply because the restriction was limited to a particular location. *See* Pet. 30-31.[4] Cataloguing alleged factual differences[5] does not dispel these conflicts.

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[4] The First Circuit's approach would mean that *Jews for Jesus* would not apply even to a complete ban on speech at the National Mall, so long as the complete speech ban was defined by location. *Jews for Jesus* itself disproves this assertion, as the restrictions there occurred only at a particular place--the airport terminal.

[5] Respondent says *Huminski* v. *Corsones*, 396 F.3d 53 (2d Cir. 2005), is different because it did not involve a "generally applicable" statute (BIO 33), but as explained above and in the Petition, the Act here can hardly be labeled "generally applicable" when it exempts abortion clinic employees. Similarly, Respondent says *First Unitarian Church of Salt Lake City* v. *Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002), is different because it prohibited all expressive activity on a pedestrian easement. BIO 34. Yet, the

Two cases concerning abortion-related speech merit particular discussion. Respondent asserts, without discussion, that there is no "true conflict" between the Third Circuit's decision in *Brown* and the decision below because the Third Circuit upheld a 15-foot buffer zone around hospitals and health-care facilities. BIO 29. But just as the supposed factual differences between this case and the cases above cannot make conflicts in *legal analysis* disappear, neither do any factual similarities between this case and *Brown* eliminate the fundamentally conflicting understanding of *Hill* embraced by the Third Circuit. First, although the Third Circuit held that a 15-foot buffer zone would, in isolation, be permissible, it held (and explained at great length) that *additional* speech restrictions beyond the 15-foot buffer zone were *not* permissible. *Brown*, 586 F.3d at 282 ("The fifteen-foot exclusion is a prophylaxis that effectively advances the City's interests. The additional burden of the bubble zone's restrictions would be, on this record, unduly—and unconstitutionally—onerous.").

Second, the Third Circuit's rejection of restrictions beyond the 15-foot buffer zone focused heavily on the burden on leafleting—a burden the Third Circuit treated entirely differently from the First Circuit. The Third Circuit explained that "leafleting is a classic form of speech that lies at the heart of the First Amendment" and that it is "especially hard hit" by the additional restrictions beyond the 15-foot zone. *Brown*, 586 F.3d at 281. Relying heavily on *Hill*, the court rejected even *Hill*-type no-approach restrictions beyond the 15-

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Act likewise prohibits *all* speech on public sidewalks. Worse, the restrictions here are triggered solely by the presence of one often-protested activity—abortion.

foot zone as either "effectively foreclos[ing]" or at least "severely curtail[ing]" leafleting. *Id.*; *see also* Dr. Alveda King *et al.* Amicus Br. 4-12.

In contrast, the First Circuit relied on *Hill* to reject virtually identical concerns about leafleting. Pet. App. 18a. Without even addressing this Court's careful discussion of leafleting in *Hill*, 530 U.S. at 727-730, the First Circuit instead cited *Hill* for the broad proposition that Massachusetts may make leafleting "impracticable without raising constitutional concerns." Pet. App. 18a.

Thus the First and Third Circuits reached inconsistent conclusions about the permissibility of speech restrictions beyond 15 feet, and did so with diametrically opposed analyses of this Court's opinion in *Hill* and its impact on the ability of government to restrict peaceful leafleting on public sidewalks.

Nor does Respondent satisfactorily address the issue of "normal conversational distance." *Hill* upheld Colorado's law in part because it allowed speech at a "normal conversational distance" of less than fifteen feet. 530 U.S. at 726-727. The Second Circuit has applied this principle straightforwardly. *See New York ex rel. Spitzer* v. *Operation Rescue Nat'l*, 273 F.3d 184, 204 (2d Cir. 2001) (cutting back as not narrowly tailored a buffer zone that "imposes a severe burden on First Amendment rights by effectively preventing protesters from picketing and *communicating from a normal conversational distance* along the public sidewalk [near the clinic]." (emphasis added) (citing *Hill*)). The First Circuit cites *Hill* for the opposite proposition.

Respondent nowhere explains how the First Circuit's application of a fundamentally different under-

standing of *Hill* from other circuits does not create a conflict warranting resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The
Supreme Court of the United States

ELEANOR MCCULLEN, ET AL.,

Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1999); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. FEC*, 540 U.S. 93 (2003).

This case has grave importance for the free speech jurisprudence governing leafletting and other classic First Amendment activities, and is therefore of special interest to the ACLJ.

SUMMARY OF ARGUMENT

This Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), has deeply unsettled the constitutional law of free speech. In several crucial respects, *Hill* rejects -- without overruling -- well-established norms of First Amendment jurisprudence. In particular, the *Hill* Court embraced (1) a presumption of an unwilling audience for speech, (2) the treatment of an expressly

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[1]Counsel of record for the parties received timely notice of the intent to file this brief. S. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

content-based restriction as content-neutral, (3) straitjacket limitations on leafletting on public sidewalks, and (4) prophylactic restrictions on speech. None of these holdings can be reconciled with prior precedent. Hence, *Hill* created an internal conflict in the constitutional law governing free speech activities.

This Court should grant review to overrule *Hill* and eliminate that conflict.

ARGUMENT

THE DECISION IN *HILL v. COLORADO* IS IRRECONCILABLE WITH PREEXISTING CONSTITUTIONAL NORMS GOVERNING FREE SPEECH AND THUS HAS PROFOUNDLY DESTABILIZED THE LAW.

The simultaneous existence of two lines of contradictory precedent is profoundly destructive of the rule of law. Such internal inconsistency enables courts to decide arbitrarily which line of precedent to invoke; hence, parties cannot predictably gauge the law governing their activities.

When the uncertainty of dueling precedents arises in the context of free speech, the consequence is especially bad: the uncertainty of legal sanctions deters speech by all but the heroic, the foolhardy, and the judgment proof.

This Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), has had precisely this destabilizing effect on the rule of law. Because *Hill* is irreconcilable with numerous prior decisions of this Court, yet did not purport to overrule such decisions, the result is an unresolved contradiction, the simultaneous existence of diametrically opposed precedents from which each

lower court can pick and choose as it sees fit. This is *not* the rule of law.

Petitioners have explained how the Massachusetts buffer statute at issue here is unconstitutional even under *Hill*. Amicus wishes to highlight the perniciousness of *Hill* itself, urging this Court to grant review and to overrule *Hill* before it further corrodes the fabric of the law.

Hill is in many respects "antithetical to our entire First Amendment tradition," 530 U.S. at 768 (Kennedy, J., dissenting). *See also id.* at 762 (Scalia, J. dissenting) ("an unabashed repudiation of our First Amendment doctrine"). While not providing an exhaustive list, amicus wishes to highlight some of the ways the *Hill* decision creates contradictory points in First Amendment jurisprudence.

1. Audience presumed unwilling

The *Hill* Court presumed as a matter of law that anyone approaching an abortion business is an "unwilling recipient" of any message a pro-life sidewalk counselor has to offer. 530 U.S. at 716-18, 727. This is not only both inaccurate as a matter of fact (some would-be abortion patients do accept leaflets or conversation from sidewalk counselors, and some ultimately choose not to abort, *see, e.g.*, Brief for Petitioners at 3-4, *Hill v. Colorado* (No. 98-1856)) and offensive to the many "thoughtful and law-abiding sidewalk counselors like petitioners," 530 U.S. at 727, it is also flatly inconsistent with this Court's case law. As long ago as *Martin v. City of Struthers*, 319 U.S. 141 (1943), this Court has held invalid restrictions on speech that deem such speech categorically unwelcome. As this Court noted in *Martin*, truly

unwilling listeners can properly be protected by enforcing the "previously expressed will" not to receive such messages, *id.* at 148. *Hill*, by contrast, inverted the rule: no one can speak unless they obtain *previously expressed consent.* 530 U.S. at 734 ("regulations . . . apply if the pedestrian does not consent"). *Compare Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970) (homeowner can take initiative to rebuff particular mailings, in advance, at will); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921) (offer of message may rightfully be declined; by contrast, initial offer, if done in an inoffensive way, is within traditional bounds of free speech).

2. Explicit content restriction deemed content-neutral

The *Hill* Court ruled that a statute that is expressly content-based -- restricting only oral "'protest, education, or counseling,'" 530 U.S. at 707 n.1 (quoting statute), while leaving unrestricted the remaining universe of messages, such as "pure social" conversation, *id.* at 721 (or, for that matter, commercial sales pitches) -- is nevertheless content-neutral if the *justification* for the restriction is content-neutral, *id.* at 720. This directly contradicts the precedent of this Court. "[W]hile a content-based purpose may be sufficient . . . to show that a regulation is content-based, it is not necessary to such a showing in all cases . . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642-43 (1994). *Accord Bartnicki v. Vopper*, 532 U.S.

514, 526 & n.9 (2001).

3. Leafletting hobbled

While the *Hill* statute did not *absolutely* ban leafletting outside abortion facilities, it did drastically hobble such leafletting. Under the *Hill* statute, leafletters cannot approach close enough merely to *offer within reach* a flyer, without first obtaining the passerby's consent. 530 U.S. at 707 & n.1, 727-28. At best, leafletters can stand still "near the path of oncoming pedestrians and proffering" the material like a parking garage ticket dispensing machine. *Id.* at 727. By contrast, the precedents of this Court, aside from *Hill*, uphold vigorous First Amendment protection for leafletting. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Jamison v. Texas*, 318 U.S. 413 (1943); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *United States v. Grace*, 461 U.S. 171 (1983); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

Notably, this constitutional protection for leafletting holds true even when the ban is not geographically absolute. As *Grace* illustrates, it is unconstitutional to ban leafletting on the sidewalks of just one particular building. *See also Schneider*, 308 U.S. at 163 ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

Nor can the controversial nature of the topic of the handbills justify such a restriction. "Indeed, . . . handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre*, 514 U.S. at 347.

Nor need the ban be unconditional; requiring prior permission to offer the material, as in *Lovell* and *Schneider*, is likewise invalid. To be sure, the *Hill* statute required that the necessary "permission" to offer a leaflet must be obtained, not from the government, but from private pedestrians. But this makes the permission requirement worse, not better. The government must at least follow non-arbitrary, non-discretionary standards when licensing speech. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). Private individuals face no such constraints, and thus can be wholly arbitrary, even viewpoint-based, in withholding consent. While this is perfectly acceptable when a private individual is controlling the flow of information *into the home*, *Rowan*, or deciding whether to *accept* a handbill from a leafletter, giving private parties licensing power over the mere *offer* of information *on a public way* is an entirely different matter. To suppress the right to speak, picket, or leaflet in a public place absent license from unconstrained private parties, under penalty of criminal enforcement, is even worse than an unconstitutional after-the-fact heckler's veto. Indeed, if it is unconstitutional merely to charge a higher permit fee based upon potential adverse audience reaction, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992), then it is necessarily unconstitutional to ban the speech altogether absent actual approval from the audience.

Under this Court's precedents, then,

> one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to

> the communication of ideas by handbills and literature as well as by the spoken word.

Jamison, 318 U.S. at 416.

Hill's miserly allowance of minimal freedom to leaflet is entirely inconsistent with the jealous constitutional protection recognized in these other cases.

4. Prophylactic restrictions on speech approved

Hill expressly approved a statute taking "a prophylactic approach" to speech regulation, 530 U.S. at 729, i.e., sweeping up substantial amounts of "harmless" *(id.)* speech as part of an effort to address proscribable misconduct. It is difficult to imagine a proposition more antithetical to this Court's free speech case law. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Accord Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988) (same); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (same); *Edenfield v. Fane*, 507 U.S. 761, 777 (1983) (quoting *Button* and noting that even commercial speech may not be subjected to broad prophylactic restrictions); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612, 616 (2003) (noting condemnation of prophylactic restrictions on charitable solicitation). *But cf. Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 382 (1997) (approving prophylactic *injunctive* restrictions on *particular defendants*).

* * *

The *Hill* decision, by announcing several novel constitutional rules in profound tension with this Court's existing free speech jurisprudence, has deeply destabilized the law. This Court should grant review and overrule *Hill*.

CONCLUSION

This Court should grant the petition for certiorari.

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ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, AND ERIC CADIN,
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MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law professors who teach and write in the area of First Amendment law. Although *amici* have divergent perspectives on the Court's abortion jurisprudence, *amici* agree on the importance of the First Amendment principles at stake in this case.

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Michael Stokes Paulsen is Distinguished University Chair and Professor of Law at the University of St. Thomas Law School. The courses

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[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* S. Ct. Rule 37(a). Counsel for both parties have consented to the filing of this brief, and their written consents have been filed with the Court. No counsel for a party authored the brief in whole or in part, and neither a party nor counsel for a party made any monetary contribution intended to fund the brief's preparation or submission.

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SUMMARY OF ARGUMENT

The Court should grant certiorari to reverse the First Circuit's decision upholding against First Amendment challenge a prohibition on public-forum speech that applies only at freestanding clinics where abortions are performed, exempts clinic agents and employees, and criminalizes peaceful, non-obstructive speech, including conversation with willing listeners, stationary handbilling, and speech from a conversational distance. By granting certiorari, the Court can begin to reconstruct a consensus on free speech principles that appeared to break down in *Hill v. Colorado*, 530 U.S. 703 (2000). The Court can also prevent further erosion of First Amendment protections for public-forum speech by placing clear limits on *Hill*.

REASONS FOR GRANTING CERTIORARI

I. THE FIRST CIRCUIT'S EXPANSION OF *HILL V. COLORADO* THREATENS SERIOUS DAMAGE TO FIRST AMENDMENT JURISPRUDENCE.

This Court's decision in *Hill v. Colorado* upheld a law that prohibited close, physical approaches by anyone, without consent, at all health care facilities in Colorado. *See* 530 U.S. at 708 n.1 (setting forth text of Colorado statute). The First Circuit's decision below stretched *Hill* to uphold a Massachusetts law that creates a public-forum no-speech zone with a 35-foot radius that (i) applies only at free-standing clinics that perform abortions, (ii) does not apply to employees and agents of these clinics, and (iii) prohibits speech directed toward willing and unwilling listeners alike in a wide swath of the public forum, rather than remaining limited to a prohibition of close, unwanted physical approaches. *See* Mass. Gen. Laws ch. 266, § 120E1/2 (2007) (the "Act"). This expansion of *Hill* threatens to multiply the damage to First Amendment jurisprudence that results when free-speech decisions track ideological divides over the subject-matter of the underlying speech.

This Court's decisions in the flag-burning cases exemplify the sort of judicial agreement about First Amendment principles across ideological divides that was able to "generate nearly a decade or more of consensus about free-speech cases." Laurence Tribe, *quoted in Colloquium*, 28 PEPP. L. REV. 747, 752 (2001) (describing "the civil peace that

was brilliantly exemplified by the union of right and left in the flag burning cases"); *see also* Michael W. McConnell, *Colloquium*, 28 PEPP. L. REV. 747, 747 (2001) (considering flag-burning cases "a high point where people across the spectrum were able to agree upon a way of analyzing free-speech claims").

Since those cases, however, the "coherence of free-speech doctrine has truly broken down, and it's broken down in a way we should be extremely worried about—*Hill v. Colorado* being the centerpiece of this." McConnell, 28 PEPP. L. REV. at 747; *see also* Tribe, 28 PEPP. L. REV. at 752 (noting the possible end of consensus "as a result of the feeling of bad faith that a case like [*Hill*] generates"). Several members of this Court,[2] as well as a diverse array of legal scholars, have pointed out that *Hill* departed from the standard First Amendment analysis of restrictions on speech in a traditional public forum. For example, *Hill*:

> (i) obscured the distinction between content-neutral and content-based restrictions on speech;[3]

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[2] *See Hill*, 530 U.S. at 741-765 (Scalia, J., dissenting, joined by Justice Thomas); *id.* at 765-792 (Kennedy, J., dissenting).

[3] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1298 & n.174 (2007) (citing *Hill* for the proposition that "Court majorities have unconvincingly denied that the predicate conditions for strict scrutiny actually exist—for example, by maintaining that a content-based restriction on speech is not really content-based"); John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1127 (2005) (pointing out that in *Hill* "one must necessarily examine the content of a person's speech to determine if it constitutes 'education, protest or counseling'"); Heidi Kitrosser, *From Marshall McLuhan to*

(ii) inverted ordinary First Amendment principles by imposing a "listener preclearance requirement";[4]

(iii) created "a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places";[5]

Anthropomorphic Cows: Communicative Manner and the First Amendment, 96 NW. U. L. REV. 1339, 1400-1406 (2002) (conducting thorough inquiry into why statute in *Hill* was content-based); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) ("*Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content."); McConnell, 28 PEPP. L. REV. at 748 ("You cannot tell, other than by the content of what I say, whether the law [in *Hill*] is being violated or not. Now if that is not content-based, I just do not know what 'content-based' could possibly mean."); *cf.* Erwin Chemerinsky, *Colloquium*, 28 PEPP. L. REV. 747, 752-753 (2001) (agreeing with the result in *Hill* but disagreeing with the Court's rationale: "Where I become concerned is where the Court tried to find a content-neutral regulation, and the problem is the whole doctrine of content neutrality right now is quite confused. . . . [and] this case further adds to the confusion . . . .").

[4] Sullivan, 28 PEPP. L. REV. at 737 ("*Hill* is unusual . . . with the Court giving greater than usual deference to a law permitting a listener preclearance requirement on speech in the public forum—a holding inconsistent with the usual rule that, in the public forum, speakers may take what initiative they wish toward listeners, while offended listeners must simply turn the other cheek."); McConnell, 28 PEPP. L. REV. at 748 (agreeing that "one of the ways in which *Hill v. Colorado* inverted ordinary free-speech principles" was "by rejecting the principle that it is the person—it's the unwilling listener—who has the burden of action, and not the speaker").

[5] Clark LeBlanc & Jamin B. Raskin, *Disfavored Speech About Favored Rights:* Hill v. Colorado, *The Vanishing Public Forum*

> (iv) illustrated "how far the Court has allowed overbreadth to drift from its central premises";[6] and
>
> (v) recognized "a public 'right to be let alone' [that] is in tension with literally decades of First Amendment jurisprudence."[7]

For these reasons, among others, *Hill* has been condemned by both progressive and conservative scholars, including one prominent jurist who has described the case as "slam-dunk simple and slam-dunk wrong." Tribe, 28 PEPP. L. REV. at 750.

Hill has also resulted in divisions among the lower courts over First Amendment analysis of public-forum speech restrictions, divisions deepened by the First Circuit's decision below.[8] Additionally, the First Circuit's expansion of *Hill* has already underwritten the contraction of First Amendment protections from Pittsburgh, Pennsylvania to Oakland, California in the short time since it was handed down.[9]

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and the Need for an Objective Speech Discrimination Test, 51 AM. U. L. REV. 179, 182 (2001).

[6] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 72 (2003).

[7] Timothy Zick, FREE SPEECH OUT OF DOORS 101 (University of Cambridge Press, 2008).

[8] *See* Petn. 28-31 (identifying split involving First, Third, Eighth, and Ninth Circuits regarding whether and how governments may establish speech-free buffer zones); Petn. 31-32 (identifying four-to-two circuit split on how to analyze complete bans of speech).

[9] *See Brown v. City of Pittsburgh*, 586 F.3d 263, 276 (3d Cir. 2009) (relying on "the First Circuit's recent decision in

The Court granted certiorari in *Hill* "[b]ecause of the importance of the case." 530 U.S. at 714. The First Circuit's expansive application of *Hill*, and the spread of the First Circuit's logic, reveal a need for this Court's intervention to clarify the ground rules for speech restrictions targeting speakers in various public fora. The Court should grant certiorari to restore First Amendment protection to speakers in traditional public fora, to prevent additional courts from following the First Circuit's expansion of *Hill*, and to address the divisions the First Circuit has deepened.

II. THE FIRST CIRCUIT'S DECISION REVEALS THE IMPORTANCE OF PLACING CLEAR LIMITS ON *HILL V. COLORADO*.

The First Circuit's decision provides legislatures and courts with a blueprint for enacting targeted public-forum speech restrictions to eliminate disfavored speech without triggering strict scrutiny. This case presents the opportunity to place clear limits on *Hill v. Colorado* with respect to narrow tailoring analysis and content- and viewpoint-neutrality determinations.

McCullen v. Coakley" in upholding the validity of a 15-foot no-speech zone); *id.* at 281 n.19 (approvingly invoking the lower court opinions in *McCullen* for identifying the government's "easier enforcement task" as an advantage of a no-speech zone over a no-approach zone); *Hoye v. City of Oakland*, 642 F. Supp. 2d 1029, 1044 (N.D. Cal. 2009) (citing *McCullen* for the proposition that a speaker "has no right to communicate at a polite (i.e. close) distance," in the course of upholding Oakland's municipal buffer-zone ordinance).

First, the Court can make clear that a prohibition on public-forum speech that encompasses within its prohibition (i) approaches to consenting listeners, (ii) stationary handbilling, and (iii) speech from a normal conversational distance, is not narrowly tailored to a government interest in protecting unwilling listeners from close, physical approaches.

The Court recognized in *Hill* that "the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and [that] to do so there must be opportunity to win their attention.'" 530 U.S. at 728 (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). The statute in *Hill* explicitly permitted speech with willing listeners: specifically, it permitted a speaker to approach another person within 8 feet for the purpose of communicating if the "other person consents" to the approach. Colo. Rev. Stat. § 18-9-122(3). Throughout its opinion, the Court stressed the fact that, although the buffer-zone statute 'inhibited a speaker's ability to reach *unwilling listeners*, the statute preserved a speaker's ability to reach *willing listeners*, and the Court emphasized the importance of this distinction to the disposition of the case.[10]

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[10] The Court framed the question as "whether the Colorado statute reflects an acceptable balance between constitutionally protected rights of law-abiding speakers and *the interests of unwilling listeners*." *Hill*, 530 U.S. at 714 (emphasis added). The Court emphasized: "It is also important when conducting this interest analysis to recognize the *significant difference* between state restrictions on a speaker's right to address a

By contrast, the Act here prohibits all communication, not only speech aimed at unwilling listeners but also conversations between a speaker and a willing listener. Although the statute does contain exemptions from its categorical prohibition on entering or remaining in the no-speech zone for four categories of speakers, *see* Mass. Gen. Laws ch. 266, § 120E1/2(b)(1)-(4), there is no "consent" exemption that allows a person to enter the public way or sidewalk and communicate with a willing listener. Consequently, this Act is not "narrowly tailored" to the governmental interest in protecting unwilling listeners recognized in *Hill*. *See Hill*, 530 U.S. at 727 ("Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.").

The Court in *Hill* also emphasized in its narrow tailoring analysis that the 8-foot no-approach zone at issue permitted both speech from a normal conversational distance and stationary handbilling.[11]

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willing audience and those that protect listeners from unwanted communication. *This statute deals only with the latter.*" *Id.* at 715-716 (emphases added). Moreover, in considering whether the statute was "narrowly tailored," the Court thought that "it was worth reiterating that only attempts to address *unwilling listeners* are affected" by the statute, *id.* at 727 (emphasis added), including "the ability of a leafletter to deliver handbills to some unwilling recipients," *id.*, and the "ability to communicate with unwilling readers," *id.* at 728. With respect to citizens' rights to "reach the minds of willing listeners," the Court concluded that, because of the exception for consensual approaches, the "Colorado statute adequately protects those rights." *Id.*

[11] *See Hill*, 530 U.S. at 726-727 (stating that "this 8-foot zone allows the speaker to communicate at a 'normal conversational distance'" (quoting *Schenk v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997)); *id.* at 727 ("T]he statute does

This focus also appeared in Justice Souter's concurring opinion, which Justices O'Connor, Ginsburg, and Breyer joined.[12] These opinions' emphasis on the preservation of stationary handbilling and speech from a normal conversational distance was presaged in questioning by multiple Justices from the *Hill* majority at oral argument.[13]

The categorical prohibition of the Act here prevents both stationary handbilling and speech from a conversational distance. Notwithstanding *Hill*, the First Circuit asserted that "the Constitution

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not . . . prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept."); *id.* ("The statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute.").

[12] *See Hill*, 530 U.S. at 738 (Souter, J., concurring) (asserting that "the content of the message will survive on any sign readable at eight feet and in *any statement audible from that slight distance*") (emphasis added); *id.* (stating that "[t]he fact that *speech by a stationary speaker is untouched* by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching") (emphasis added).

[13] *See* Oral Arg., *Hill v. Colorado*, No. 98-1856, 2000 WL 72054, at *2 (Breyer, J.) ("[W]hat speech is it difficult for anyone to make when you're about this 8 feet, say, the distance between me and Justice Kennedy?"); *id.* at *6 (O'Connor, J.) ("You certainly can convey anything you want to convey orally from a distance of 8 feet. It's just not difficult. You can speak in a normal conversational tone and be heard fully."); *id.* at *7 (Breyer, J.) ("What's the problem if I can stand still, hand [out a leaflet] just like this, and she'd have to walk around in order to avoid taking it, but she's free to walk around under this statute?"); *id.* at *9 (Stevens, J.) ("I'm concentrating on the leafleting now because, it seems to me, that's your strongest argument.").

neither recognizes nor gives special protection to any particular conversational distance," App. 18a, and that "handbilling is not specially protected," *id.* By granting certiorari, the Court can ensure that the First Circuit's misapplication of the narrow tailoring analysis of *Hill* does not spread.

The Court can also clarify the criteria for assessing content- and viewpoint-neutrality under *Hill*. As the petition for certiorari observes, the Massachusetts legislature's singling out of abortion protesters for special speech rules is impossible to ignore given that the Act's no-speech zones (i) apply only at freestanding clinics that perform abortions, and (ii) do not apply to the activities of clinic employees and agents. By contrast, the Colorado law upheld in *Hill* applied at all medical facilities,[14] and applied equally to "all 'protest,' to all 'counseling,' and to all demonstrators . . . whether they oppose or support the woman who has made an abortion decision."[15] Whether *Hill* permits Massachusetts' abortion- and speaker-specific speech restrictions to stand without enduring strict scrutiny raises a significant question that warrants this Court's review.

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[14] *See Hill*, 530 U.S. at 708 n.1.

[15] *Id.* at 725.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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(4)

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ELEANOR McCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, and ERIC CADIN,

Petitioners,

v.

MARTHA COAKLEY, Attorney General for the Commonwealth of Massachusetts,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICUS CURIAE BRIEF OF 40 DAYS FOR LIFE IN SUPPORT OF PETITIONERS AND THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae 40 Days for Life is a community-based campaign that draws attention to the harms of abortion. Set during a 40-day time period in numerous cities throughout the United States, the most visible component of 40 Days for Life is a constant prayer vigil outside locations where unborn children are aborted. Participants pray and fast outside abortion clinics 24-hours a day during that 40-day time period. The most recent 40 Days for Life campaign was conducted in 212 communities in the United States. More than 85,000 people participated worldwide.

MASS. GEN. LAWS ch. 266, § 120E1/2 ("the Act") will inhibit *Amicus* from carrying out its peaceful prayer vigils outside of abortion clinics in Massachusetts by creating a "pro-life speech-free zone." The Act forbids participants in 40 Days for Life campaigns from praying on public sidewalks in close proximity to abortion clinics. It prohibits *Amicus* sidewalk counselors from providing wanted and requested help to women entering abortion clinics in Massachusetts, while it explicitly allows abortion

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[1] This brief is filed with the written consent of the parties. Letters of consent have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part. No entities other than the *Amicus* or its counsel have made a monetary contribution to the preparation or submission of this Brief.

The parties were notified ten days prior to the due date of this brief of the intention to file.

clinic employees on the same public walkways to communicate with women and encourage abortion. This content-based, viewpoint discriminatory Act hinders the First Amendment and Equal Protection rights of *Amicus* and is unconstitutional. As such, *Amicus* urges this court to grant the petition for *writ of certiorari* and reverse the decision of the lower court.

SUMMARY OF ARGUMENT

In 2007, Massachusetts enacted a law to establish a "pro-life speech-free zone" surrounding all locations performing abortions across the state except those within or upon the grounds of hospitals. This 35-foot radius zone extends around abortion clinic driveways, entrances, and exits encompassing public streets and sidewalks. MASS. GEN. LAWS ch. 266, § 120E1/2 ("the Act") prohibits anyone to "enter or remain on a public way or sidewalk adjacent" to a stand-alone abortion facility, but it does not equally apply to all persons. The Act exempts four classes of individuals, permitting them to enter or remain in this designated area: (1) persons entering or leaving the abortion clinic facility; (2) employees or agents of the abortion facility acting within their scope of employment; (3) law enforcement, ambulance, fire-fighting, and other municipal agents acting within the scope of their employment; and (4) persons using the public sidewalk or street right-of-way adjacent to

the abortion clinic solely for the purpose of reaching a destination other than the clinic. *Id.* at § 120E1/2(b).

A narrowing interpretation by an enforcement authority may prove to save this facially discriminatory Act from Equal Protection challenges, but in this case the Massachusetts Attorney General's interpretation and guidance to police officers only magnifies its unconstitutionality. The Attorney General's letter of guidance undoubtedly reaches beyond the state's professed interest in public safety and clearly infringes upon First Amendment protected speech. In doing so, the State explicitly employs unequal treatment of individuals based strictly on the viewpoint expressed about abortion. The Act's exemption for abortion clinic employees and agents allows differential treatment of similarly situated individuals both on its face and, even more strikingly, when the Attorney General's interpretation impinges First Amendment speech.

This "no enter zone" for those opposing abortion is clearly marked for police to arrest and punish any person engaging in pro-life advocacy, including: speaking; praying; wearing t-shirts, hats, or buttons; displaying signs; leafleting or handbilling; making consented approaches; and peaceful conversing or demonstrating. It prohibits all methods of communication for the pro-life message, but protects abortion advocacy by permitting abortion clinic employees and agents to enter and remain in the zone.

The First Circuit failed to recognize the content- and viewpoint-basis of the Act and erred in its application of *Hill v. Colorado,* 530 U.S. 703 (2000). The Act is not a content-neutral time, place, and manner restriction deserving the First Circuit's expressed intermediate scrutiny – but seemingly rational basis – analysis and simple dismissal of all Equal Protection concerns. This Act is a content-based, viewpoint discriminatory law that warrants a much more stringent analysis under strict scrutiny. If this Court permits the First Circuit's decision to stand, it creates a dangerous and threatening precedent for First Amendment expressions and Equal Protection.

In summary, this Act is content-based, and the Attorney General's interpretation of the Act – which must be read as an express part of the Act – magnifies the unconstitutionality of the Act. The Act's exemptions for abortion clinic patrons and employees constitutes viewpoint discrimination and violates the Equal Protection clause by prohibiting all speech by pro-life advocates, while explicitly allowing speech by abortion clinic employees and patrons. This Court should grant the petition for *writ of certiorari* and review the First Circuit's decision and misapplication of *Hill*.

ARGUMENT

I. THE ACT IS CONTENT-BASED AND SHOULD BE READ AS IF THE ATTORNEY GENERAL'S INTERPRETATION AND GUIDANCE ON ENFORCEMENT IS EXPRESSLY PART OF THE ACT

The Act is clearly content-based when considered in light of the Attorney General's interpretation. The Attorney General's letter, dated January 25, 2008 – sent to law enforcement personnel and all individual abortion clinics – summarized the Act and provided guidance to assist in applying the Act's four exemptions. The letter expounded on the Act's exemptions and interpreted them to: 1) Permit "persons entering or leaving the clinic . . . to cross through the buffer zone" but to not permit "companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose"; and 2) Permit "employees or agents of the clinic acting within the scope of their employment" to enter the zone to assist patients, "but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone." The Attorney General also interpreted the third and fourth exemptions for "municipal employees" and all other "persons using the sidewalk or street adjacent to the clinic to reach a destination other than the clinic" to permit entrance but prohibit them from expressing their views about abortion or

engaging in any other partisan speech within the buffer zone.

In *Cox v. Louisiana*, this Court set a clear standard that when governmental authorities impose "pervasive restraint on freedom of discussion" through a facially neutral statute it is "not any less effective than a statue expressly permitting such selective enforcement." 379 U.S. 536, 557 (1965). Although *Cox* addressed an ordinance requiring prior permission to use the public streets, this Court in *Cox* positively laid out the principle that when a state interprets and enforces a facially neutral statute based on the content of expressions, the Act must be viewed as if the content-driven enforcement is expressly part of the statute. *Id.*

This Court reasoned that the Louisiana statute, as interpreted, allowed for impermissible convictions for innocent speech and assembly protected by the First Amendment. This Court stated,

> Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. . . . "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

Id. at 552 (quoting Chief Justice Hughes in *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

Furthermore, in *Grayned v. City of Rockford*, this Court recognized an important rule of interpretation and analysis: To look toward the "'words of the ordinance itself,' to the interpretations the court below has given to analogous statutes, and perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." 408 U.S. 104, 110 (1972).

Rather than adhere to this well-established Supreme Court precedent, the First Circuit relied upon its decision in *McGuire v. Reilly*, 386 F.3d 45, 58 (1st Cir. 2004) (*McGuire II*), and explained that "a state official's interpretation of a statute, even if generally authoritative, cannot render an otherwise constitutional statute vulnerable to facial challenge." *McCullen v. Coakley*, 571 F.3d 167, 178 (1st Cir. 2009). It quoted no authority or precedent – outside itself – in this assertion, and went on to conclude, "[W]e find nothing in either the text or the legislative history of the 2007 Act that deprives the statute of content-neutral status." *Id.* In other words, the court held that the letter of interpretation and guidance from the Attorney General – the state authority charged with enforcement – had no role in a facial challenge. This conclusion is imprudent and dangerous to protected speech quintessential to the First Amendment.

Contrary to this extraordinary attempt by the First Circuit to ignore the impact of the Attorney General's letter on this Act, the Third Circuit in its recent decision in *Brown v. City of Pittsburg*

recognized that "[w]hen considering a facial challenge to a state law, 'a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.'" 2009 U.S. App. LEXIS 23979, *25 (3rd Cir. Oct. 30, 2009) (quoting *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982)). In its analysis, the Third Circuit referenced the First Circuit's decision in *McGuire II*, noting that the Massachusetts Attorney General had set forth a limiting interpretation of the Act. *Id.* at 25-26. That is to say, the Third Circuit considers an interpreting instruction as if it is explicitly part of the statute.

An interpretation governing enforcement of a statute can narrow a statute to make it constitutional – as with overbreadth and vagueness issues – but it can also promulgate content-based viewpoint discrimination and subject it to strict scrutiny. The First Circuit references the Attorney General's guidance and narrowing interpretation to ward off First Amendment overbreadth claims, but then regards it as irrelevant when it comes to Equal Protection claims. The court cannot have it both ways. The Attorney General's letter does tailor and narrow the Act, and in doing so it reveals the unconstitutional intent of the State: To criminalize any expression opposing abortion – and all partisan speech for that matter – on public walkways adjacent to abortion clinics in Massachusetts.

The Act before the Court today is distinguishable from the one in *Hill v. Colorado*. First, the Colorado

statute applied to all health care facilities. *Hill*, 530 U.S. at 707. Second, it encompassed a few subject matters of possible protest. *Id.* at 723. Third, the Colorado statute was a "no approach" law still permitting engagement on the pro-life message with willing listeners. *Id.* at 708. And fourth, the 8-foot zone still allowed for a "normal conversational distance" between a potential listener and the messenger. *Id.* at 726-27 (quoting *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997)).

The Massachusetts Act is quite different. It prohibits all communication of pro-life messages within the designated 35-foot radial (70-foot in diameter) zone around only abortion clinics. In *Hill*, this Court recognized, "The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Id.* at 716. *Hill* affirmed that it is "constitutionally repugnant" to prohibit a discussion of particular topics, while others are allowed.

Under the applicable interpretation, it is clear that if speech – any form of expression via flyer, t-shirt, button, sign, or otherwise – pertains to abortion, it is illegal. It is not so clear as to the content prohibited as "partisan speech." "Partisan" by definition simply means a person "devoted to or

biased in support of a single party or cause."[2] The First Amendment quintessentially protects partisan speech – topics that an individual finds imperative to discuss and persuade others to see likewise. Yet "partisan speech" remains undefined within this Act with broad implications. This capacious inclusion enables public officials to determine what "partisan speech" means and whether such speech violates the Act.

Even though the Attorney General acknowledges that police should arrest someone for wearing their favorite sports team t-shirt and hat through the zone, the First Circuit simply waives this issue. *McCullen*, 571 F.3d at 182. The truth of the matter is that abortion is the only partisan speech of concern to the Attorney General and the State. The attempt to broaden the subject matter to include partisan speech does not remedy its offense and in fact makes it even more problematic. This Act is not meant to suppress speech of "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." *Hill*, 530 U.S. at 723. The First Circuit's lack of concern for the breadth of partisan speech evidences the clear, intended purpose of this Act – to target and suppress the views of those that oppose abortion – and the court's willingness to sanction this content-based and viewpoint discriminatory Act.

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[2] THE AMERICAN HERITAGE DICTIONARY 906 (Houghton Mifflin Company, 2nd ed. 1985).

II. THE ACT'S EXEMPTIONS FOR ABORTION CLINIC EMPLOYEES, AGENTS, AND PATRONS GIVE RISE TO VIEWPOINT DISCRIMINATION

Relying on *Hill* and its own opinions in *McGuire I*[3] and *II*, the First Circuit declared the Act content-neutral and an appropriate time, place, and manner regulation. In doing so, it dismissed any argument for viewpoint discrimination. The First Circuit discussed the delicate balance between the infringed-upon freedom and the governmental interest, but then miscalibrated the scales. It identified a continuum with one end being "laws in which the government attempts to differentiate between divergent views on a singular subject; that is laws in which the government attempts to 'pick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook.'" *McCullen*, 571 F.3d at 175 (citing *Berner v. Delahanty*, 129 F.3d 20, 28 (1st Cir. 1997)). It then misplaced this Act on the opposite end of the continuum. The First Circuit acknowledged that such "viewpoint-based discrimination is highly offensive to the core values of the First Amendment, and courts are wary of such encroachments," but it failed to identify this Act for what it is – viewpoint discrimination. *Id.*

Unlike the Colorado statute in *Hill*, the 2007 Massachusetts Act falls squarely within this highly

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[3] *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001) (*McGuire I*).

offensive category attempting to suppress the particular ideology opposing abortion. The Act broadly prohibits entering or remaining within the zone surrounding abortion clinics but then exempts patrons, employees, and agents of the clinic – permitting preferential treatment of abortion advocates and those engaged in business with the industry.

Under the first exemption "for persons entering or leaving the clinic," the Attorney General instructs police to permit these individuals to pass through the zone, but not permit them "to stand or remain in the buffer zone, whether to smoke, talk with others, or for any other purpose." According to the Attorney General, the Act does not restrict what they are wearing or carrying. It does not prohibit pro-abortion attire or speech while passing through the zone – simply to enter or remain. Women visiting the clinic, those accompanying them, delivery persons, and the like can all pass through the zone – say and wear anything – as long as they don't "stand or remain." These privileges are not extended to pro-life demonstrators or others passing through the zone to reach a destination other than the clinic. All other exempted categories are prohibited from expressing their "views about abortion or to engage in any other partisan speech within the buffer zone."

The second exemption for "employees or agents of the clinic acting within the scope of their employment" permits this exempted class to enter or remain in the zone as long as they do not express their views about abortion or engage in any other partisan

speech. This interpretation is a non sequitur. By definition, the scope of employment encapsulates and communicates a position in favor of abortion. The Attorney General's deciphering of what is criminal and what is not turns not only on the content, but the viewpoint of the person. Anyone promoting and advancing the abortion business can enter, remain, and communicate within the zone at some level.

In *Hill,* this Court found the Colorado statute placed "no restrictions on – and clearly does not prohibit – either a particular viewpoint or any subject matter that may be discussed by a speaker." *Hill*, 530 U.S. at 723. The Massachusetts Act does not warrant this same distinction. For abortion clinic employees to be able to enter the zone within their scope of employment turns on viewpoint. One side of the abortion debate is represented in the zone while the other position is facially and strictly prohibited.

Under the Act, it is presumptively permissible for abortion clinic employees and agents to be within the zone, despite the fact that there can be no certainty of whether an employee is *lawfully* in the zone by client request for escort or whether the employee is simply in the zone to engage in pro-abortion advocacy. *See McGuire II,* 386 F.3d at 51-52 (referring to the evidence that clinic employees advocate a pro-abortion view in words and actions).[4] But is there really a

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[4] In *McGuire II*, the First Circuit's presentation of facts demonstrated that clinic escorts were just as disruptive to public

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distinction? For an abortion clinic employee or agent to be in the zone as an escort or to simply be in the zone is one in the same.

In contrast, the Act presents a presumption against the pro-life advocate. Thus, the charging orders from the face of the statute and the Attorney General's interpretation are to arrest anyone present to peacefully pray, leaflet, handbill, counsel, educate, demonstrate, or simply speak out against abortion if she enters or remains in the zone, but permit abortion advocates to enter and remain as they please.

In *Police Dep't of the City of Chicago v. Mosley*, this Court looked to the Equal Protection Clause of the Fourteenth Amendment to hold a Chicago city ordinance unconstitutional because it treated some picketing differently from others. 408 U.S. 92, 94-95 (1972). The Court recognized the intertwining of First Amendment interests with the Equal Protection Clause of the Fourteenth Amendment and found it problematic for Chicago to determine permissible picketing based on its content. Likewise, while the pro-life person may not wear into the "pro-life speech-free

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safety (if not more so) than pro-life demonstrators. *See McGuire II*, 386 F.3d at 53. The First Circuit acknowledged that clinic escorts were warned about being overly aggressive toward pro-life demonstrators and in getting patients into the building. *Id.* This acknowledgement of the escort's overly aggressive behavior further exemplifies the content-based, viewpoint discriminatory nature of the Act. It was the State's intent to silence pro-lifers while ignoring court-documented aggression and disturbances by clinic escorts.

zone" a vest, button, or any attire that identifies her position, the abortion clinic employee may do so. This Act permits abortion clinic employees and volunteers – dressed in brightly colored vests explicitly expressing their pro-abortion position – to enter the zone, meet a clinic customer, and escort her into the clinic for an abortion appointment. This action speaks louder than any word in advocacy for abortion. Yet the Act makes it a crime for a pro-life advocate to approach a willing listener considering abortion and escort her outside the zone to discuss abortion alternatives. Within the zone, the pro-life advocate is not permitted to communicate while the advocates for abortion may speak loud and clear by leading women through the abortion clinic doors. This reality constitutes viewpoint discrimination.

In addition, the Act also allows clinic employees to make verbal statements that are forbidden of anyone wishing to communicate a pro-life message. For example, in fulfilling their "duty" to bring women into the clinic, clinic employees can grab a woman by the arm, guide her into the clinic, all the while saying, "Don't worry. I can help you. Just follow me . . . " – whether that communication is consented to by the woman or not.[5] The exact same phrase from a

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[5] In *McGuire II*, the First Circuit acknowledged that "escorts sometimes tell patients things to the effect that they do not need to listen to the pro-life protestors. . . . [E]scorts sometimes 'ask[ ]' or 'suggest[ ]' that patients give them any anti-abortion leaflets they have received from protestors. For example, they say things like: 'Do you want me to take that from

(Continued on following page)

pro-life demonstrator is forbidden under the Act, even if a woman requests help from that pro-life demonstrator. This result was intended by the State, and it is clearly viewpoint discriminatory.

III. THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND DOES NOT WITHSTAND STRICT SCRUTINY

The Fourteenth Amendment to the United States Constitution states, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." In *Carey v. Brown*, this Court declared an Illinois statute prohibiting picketing unconstitutional on Equal Protection grounds because "under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home." 447 U.S. 455, 462 (1980).[6]

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you,' or 'You know, you don't need that.'" *Id.* at 54. The 2007 Act expressly allows this continued communication by abortion clinic employees, but prohibits the exact same conduct by pro-life demonstrators.

[6] In *Carey*, the Court found the preferential treatment accorded to labor disputes while prohibiting the discussion of all other issues impermissible. The Court noted, "It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message. 'The First Amendment's hostility to content-based regulation extends not only to restrictions

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Likewise, Massachusetts, under the guise of preserving public safety, flatly prohibits pro-life advocacy within the 35-foot radius of abortion clinics while permitting pro-abortion advocacy equally likely to cause public safety concerns. The First Circuit refused to recognize that the Attorney General's authoritative guidance to police invokes the First Amendment and Equal Protection clause of the Fourteenth Amendment. The Act must meet strict scrutiny.

It is apparent that the State's interest does not survive strict scrutiny and the First Circuit erred in applying more of a rational basis analysis. After declaring the Act content-neutral, the First Circuit claimed to proceed under "intermediate scrutiny, recognizing that the constitutionality of the 2007 Act turns on whether it is narrowly tailored and allows sufficient alternative means of communication." *McCullen*, 571 F.3d at 178. But – despite First Amendment implications – it concluded that the decision to exempt employees and agents of the abortion clinics is "reasonably related to the legislature's legitimate public safety objectives." *Id.*

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on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Carey*, 447 U.S. at 462 n.6 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)). Similarly, the attempt by Massachusetts to bar public discussion of abortion outside abortion clinics is unconstitutional on its face, and it also fails under the Equal Protection clause by preferring the pro-abortion position and criminalizing the opposing pro-life view.

Massachusetts professes to exercise the traditional police powers for public safety and abortion access. These are not legitimate interests warranting the Act's chilling effect on protected speech. Nor is it a legitimate interest for the State to enact a sweeping "pro-life viewpoint free" zone because it is easier to enforce than a "no approach" zone.[7] A state's "public safety objectives" could be cited for any forum of public debate when an issue draws passionate responses from both sides. "Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against." *Hill*, 530 U.S. at 787 (Kennedy, J., dissenting). "Nowhere is the speech more important than at the time and place where the act is about to occur." *Id.* at 788. For pro-life advocates and demonstrators, the 70-foot diameter "zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place. It is the location where the Court should expend its utmost effort to vindicate free speech, not to burden or suppress it." *Id.* at 789.[8]

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[7] *McCullen*, 571 F.3d at 176 (discussing how the law was enacted in response to public safety and police concerns in enforcing the 2000 "no approach" law).

[8] The First Circuit looked to *Hill* and applied the *Ward* standard in *McCullen*. "The principle inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the

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In *McGuire II*, relying on *McGuire I*, the First Circuit dismissed the discriminatory viewpoint argument under the standard that "so long as a reviewing court can 'envision at least one legitimate reason for including the employee exemption in the Act,' the law is not facially unconstitutional." *McGuire II*, 386 F.3d at 58. The First Circuit set this low standard and

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message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A complete prohibition on pro-life expressions in a 70-foot diameter zone around abortion clinics "suppress[es] a great quantity of speech that does not cause the evils that [the State] seeks to eliminate." *Id.* at 800 n.7. The misapplication of the *Ward* standard to this Act permits the unconstitutional curtailing of protected speech and unequal treatment of similarly situated individuals – those advocating for and against abortion.

In his dissent in *Hill*, Justice Scalia argued that the Court makes too much of the statement in *Ward*, stating, "There comes a point – and the Court's opinion today passes it – at which the regulation of action intimately and unavoidably connected with traditional speech is a regulation of speech itself." *Hill*, 530 U.S. at 745 (Scalia, J., dissenting). If not the Colorado statute in *Hill*, then surely this Massachusetts Act crosses this point by prohibiting the mere presence of anyone that may silently and peacefully express a view opposing abortion.

Citizens involved in a moral public debate can make great headway if they can reach those within the proximity of where the moral injustice is occurring, and abortion advocates understand this. The State – in conjunction with the pro-abortion lobby – does not present any evidence of public health and safety threats warranting a sweeping ban on all pro-life expressions of speech within the 35-foot radius. The Act is not prohibiting a criminal act. It is not prohibiting disruptive protests. It is not prohibiting obstruction. It is not prohibiting unwelcomed approaches. *It is* prohibiting the presence and with it all forms of effective communication of the pro-life message.

exercised its imagination to pronounce the state's interest in the employee exception legitimate. The court "envisioned" the possible explanation: "[T]o make crystal clear . . . that those who work to secure peaceful access to [abortion clinics] need not fear prosecution." *Id.* (quoting *McGuire I*, 260 F.3d at 47). In reality, what the State is making "crystal clear" is that anyone opposing abortion *need fear prosecution*.

This Court must not allow the First Circuit to proceed with this permissive standard applied in *McCullen*. The First Circuit considered this standard appropriate and settled under *Hill*. Yet this Court has indicated no such "envision" standard with statutes implicating the First Amendment. In application, this First Circuit rule defeats any Equal Protection claim.

Moreover, the First Circuit relied on its former analysis of the 2000 Act despite the significant changes in the law. *See McCullen*, 571 F.3d at 177-78 (stating the employee exception "was squarely raised and squarely repulsed in *McGuire I*" and belittling any difference between a six-foot "no approach" zone and a 70-foot diameter "no enter or remain" zone). The 2000 Act reviewed in *McGuire I* and *II* permitted all persons to access the zone but prohibited unconsented approaches from a distance of six feet. The State construed the 2000 Act to equally apply to all persons, including abortion clinic employees and agents. *McGuire II*, 386 F.3d at 64.

It is not the same with this Act. The 2007 Act prohibits consented approaches for leafleting and

handbilling; it prohibits "natural conversational distances" between sidewalk counselors and women seeking abortions; it prohibits the mere presence of all pro-life advocates whether to peacefully pray, hold a sign, or wear a button. The Act unnecessarily permits abortion clinic employees and agents to enter and remain in the zone, but bans pro-life advocates and virtually all other persons because of what they "might" do or say. This employee/agent exemption promotes a particular side of the abortion debate – the pro-abortion view. The State's interests in public safety, abortion access, and ease of enforcement are not legitimate. They do not satisfy strict scrutiny and do not ward off the First Amendment infringements and Equal Protection violations.

* * *

This Act is content-based and viewpoint discriminatory. It pushes all boundaries on regulating constitutionally protected speech. The precedent of this First Circuit decision – if allowed to stand – permits blatant viewpoint discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, which will drastically affect the First Amendment rights of persons in every state, including *Amicus*. Other courts have already begun to follow the First Circuit's misapplication of *Hill*, and the Circuit Courts of Appeal need clear direction from this Court. *See, e.g.*, *Brown v. City of Pittsburgh*, 2009 U.S. App. LEXIS 23979 (looking to the *First Circuit* decisions in its application of *Hill* and standards of review); *Hoye v. City of Oakland*, 642 F. Supp. 2d

1029 (N.D. Cal. 2009) (heavily relying on the First Circuit's decisions in *McGuire II* and *McCullen*).

CONCLUSION

For the reasons stated herein, the Court should grant the petition for a *writ of certiorari* and reverse the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, *et al.*,
Petitioner,

v.

MARTHA COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN *AMICI CURIAE* OF WALTER B. HOYE II AND LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI

Amicus Walter B. Hoye II is an individual whose moral and religious beliefs have led him to engage in advocacy in opposition to procured abortion. Rev. Hoye is particularly troubled by the high abortion rate among his fellow African-Americans. In addition to reaching out to the African-American community through public speaking and his web site, Rev. Hoye seeks to offer immediate assistance to women seeking abortion, by speaking with them as they approach an abortion clinic in Oakland, California. Until he was prohibited from doing so, Rev. Hoye would attempt to begin a conversation with women entering the clinic by approaching them and saying, "Hi, my name's Walter. May I talk to you about alternatives to the clinic?"[1] Some women would stop to talk with him; others would walk on, unhindered.

In December 2007, the City of Oakland passed an ordinance prohibiting unconsented approaches within 8 feet of any person seeking to enter abortion clinics, for the purpose of "counseling, harassing, or interfering" with such person, "harassing" being defined as leafleting, displaying a sign, or engaging in "protest, education, or counseling" of such person. Oakland Municipal Code section 8.52.010 *et seq.* Rev. Hoye immediately challenged the ordinance in federal court. On August 4, 2009, the District Court for the Northern District of California granted summary judgment for the City, relying on this Court's ruling in *Hill v. Colorado*, 703 U.S. 530 (2000), as well as the First Circuit decisions in *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001) ("*McGuire I*"), *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004) ("*McGuire II*"), and the instant case. The

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[1] A pro-abortion activist described Rev. Hoye's conduct—what he "always does"—as "He says, you know, some information about options or something to the effect and hands literature to them."

district court held, *inter alia*, that the ordinance was content and viewpoint neutral, despite explicitly finding that the City did not enforce it against abortion activists ("escorts")[2] who approach women without consent and engage in speech to "facilitate access" to the clinics. *Hoye v. City of Oakland*, 642 F. Supp.2d 1029, 1038 (N.D. Cal. 2009). The court also upheld the City's interpretation of the ordinance as prohibiting extending one's arm to persons passing by in order to hand them a leaflet. *Id.* at 1044, 1046.

In a separate criminal proceeding, Rev. Hoye was convicted of two counts of violating the no-approach ordinance. No patient or other person seeking access to the clinic had complained of his conduct, nor did any purported "victim" testify against him at trial. The complaining witnesses were escorts and clinic personnel.[3] Because the district attorney did not specify any particular incident of unlawfully approaching and because the court refused defense requests for a unanimity instruction, neither Rev. Hoye, his attorney, the district attorney, or the judge can say what person or persons entering the clinic Rev. Hoye was convicted of unlawfully approaching. That conviction

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[2] One of the escorts described their function in court testimony: "I mean, he's going—you know attempting to, you know, hand out literature and talk to them and I'm attempting to, you know, prevent him from doing so." The escorts would also carry blank pieces of cardboard to "block clients from reading what is on his sign." A video of this activity can be viewed at http://www.youtube.com/watch?v=dcKPndbwKsg. Rev. Hoye is the man dressed in black, carrying a sign reading "Jesus Loves You and Your Baby. Let Us Help You." An escort wearing an orange vest is carrying a blank piece of cardboard on a picket. To the left of the screen, another orange-vested escort is blocking a sign reading "Abortion stops a beating heart," carried by an 89-year-old woman.

[3] In addition to the charges for unlawfully approaching, Rev. Hoye was also charged with using "force, threat of force, or physical obstruction" to intimidate the escort who is seen blocking him. Oakland Municipal Code 8.52.030(a). The escort testified that Rev. Hoye made her feel uncomfortable when she stood in front of him to block his sign. She complained of his "passive aggressive" demeanor and the "sense of his trying to be so nice." He was acquitted of this charge.

is on appeal; the trial court, however, refused to stay sentencing unless Rev. Hoye would agree to stay away from the clinic for three years.

The district attorney urged the court to sentence Rev. Hoye to two years in jail, one year for each count, to be served consecutively. The court instead sentenced Rev. Hoye to pay $1130 in fines and court costs, and also to serve 30 days in jail. Rev. Hoye has completed his sentence. He continues to go to the clinic, but always under the threat of another arrest, prosecution, conviction, and incarceration should he come too close to someone in the environs of the clinic.

Amicus Life Legal Defense Foundation (LLDF) is representing Rev. Hoye in both the criminal and civil proceedings. LLDF is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990s, most of these pro-life advocates were seeking other channels to express their opposition to abortion. Unfortunately, the response in many jurisdictions was not to applaud this conversion to lawful means of advocacy, but instead to seek out ways to make this expressive activity unlawful. The Massachusetts Act that is the subject of this petition and the Oakland ordinance Rev. Hoye is challenging are just two examples of the conversion of heretofore constitutionally protected speech activity into crimes.

This brief is filed with the consent of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The statute at issue in the instant case, Chapter 266, Section 120E1/2 of the Massachusetts General Law (the "Act"), offends the First Amendment in myriad ways, some qualitative and some quantitative. This brief will focus on two qualitative issues, both related the Act's lack of content and viewpoint neutrality.

Amici refer to these issues as qualitative rather than quantitative because this Court's jurisprudence has never recognized a justifiable or acceptable level of content or viewpoint discrimination. Unlike overbreadth, narrow tailoring, ample alternative channels of communication, or vagueness, all of which are matters of degree, this Court's precedents make clear that a content-based restriction on speech is unconstitutional in the absence of a compelling state interest (which has not been asserted here), and viewpoint-based speech restrictions are simply impermissible. Thus, a finding that the statute in the instant case is content- or viewpoint-based—no matter how minimally or benevolently intended—compels its invalidation.

In the instant case, the viewpoint-based nature of the Massachusetts statute, far from being minimal or accidental, permeates it to the core. By limiting the application of the statute to sites specifically associated with speech of a certain content (abortion), and by justifying this limitation by reference to the purported "secondary effects" of speech of a certain viewpoint (anti-abortion), the Legislature rendered the law content- and viewpoint-based.

The Act also violates the First Amendment and the Equal Protection Clause by exempting clinic employees

and agents, i.e., persons who are indisputably aligned with one side of the abortion issue. By exempting these private speakers from the reach of the Act, the government is not just putting its finger on one side of the ideological scale; it is upending the scale in order to favor expression intended to encourage a woman to enter an abortion clinic, while suppressing speech intended to encourage her to think twice about entering.

ARGUMENT

I. A RESTRICTION ON SPEECH OCCURRING AT ABORTION CLINICS IS PRESUMPTIVELY CONTENT- AND VIEWPOINT-BASED.

In the instant case, the First Circuit dismissed Petitioners' argument that the statute is impermissibly focused on abortion clinics by citing its earlier rejection of the analogous argument in *McGuire I*, *supra*, 260 F.3d at 44–47. *See* Appendix to Petition for Certiorari ("App.") 13a.

The First Circuit's holding in *McGuire I* was premised on a misuse of this Court's "secondary effects" doctrine, a doctrine employed by the Court, and most of the Circuits, exclusively in the context of sexually oriented businesses. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[4]

The First Circuit located the allegedly harmful secondary effects in the "evidence that abortion protesters are particularly aggressive and patients particularly vulnerable as they enter or leave" abortion clinics. *McGuire*

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[4] Justice Kennedy has acknowledged that the "secondary effects" test, allowing restrictions on sexually oriented businesses, is "something of a fiction," although a tolerable one in the context of zoning restrictions which have a "built-in legitimate rationale." *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 448–49 (2002) (plurality) (Kennedy, J., concurring).

I, 260 F.3d at 44. The court repeatedly invoked the government's need to "combat" or "curb" these "deleterious secondary effects of anti-abortion protests" as a content neutral justification for singling out anti-abortion speech for regulation. *Id.* at 44–46.

This Court has explicitly disapproved both prongs of this reasoning. First, "listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (striking down restriction on picketing in front of foreign embassies). "The emotive impact of speech on its audience is not a 'secondary effect.'" *Id.* at 321. Thus, the argument that restrictions singling out anti-abortion speech are justified because of the emotional vulnerability of women considering abortion is constitutionally untenable.

Second, this Court has rejected the attempt to justify speech restrictions based on generalizations about subject matter:

> Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. **Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.**

Police Department of Chicago v. Mosley, 408 U.S. 92, 100–101 (1972) (emphasis added). Indeed, it would be a soft foundation for free speech and equal protection that

would permit the government to restrict speech activity on a hotly debated issue, and, worse, of one side of that issue, based on wholesale stereotyping of that side.

A restriction may be content neutral if it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (original emphasis) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).) As is clear from the First Circuit's decision in *McGuire I*, relied on in the instant case, the putatively "content neutral" justification for the statute is the alleged upsetting and disruptive nature of anti-abortion protests. There is nothing content or viewpoint neutral about a restriction on speech that is directed at particular locations defined by the activity that occurs there, and **justified** by means of a "broad classification" as to the level of disruptiveness of these protest activities.[5] Such an ordinance is as blatantly viewpoint-based as if the Ordinance said on its face that it only applied to anti-abortion speech.

Sixty years ago, Justice Robert Jackson trenchantly observed:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the po-

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[5] By contrast, consider an ordinance restricting speech activity within 15 feet of the entrance to abortion clinics, which the government justified because emergency medical personnel were frequently summoned to abortion clinics and needed immediate access to the entrances. Such a law, while vulnerable for overbreadth and lack of narrow tailoring, would at least be justified without reference to the content of the regulated speech.

> litical retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express v. New York, 336 U.S. 106, 112–113 (1949) (Jackson, J., concurring.).

Although the context of Justice Jackson's observation was an equal protection challenge, it is, if anything, even more relevant in the context of a speech-restrictive law like the Act. There is nothing praiseworthy in a legislative body "making every effort to restrict as little speech as possible" (*McGuire I*, 260 F.3d at 44) when this narrow focus enables the government to impose more stringent restrictions on the speech of an unpopular minority than would be politically tolerable if the law were more generally imposed.

This Court should grant the petition in this case to correct the First Circuit's abuse of the "secondary effects" doctrine, an abuse that is now being replicated in other jurisdictions. *See, e.g.*, *Brown v. City of Pittsburgh*, 2009 WL 348938 at *11 n.17 (3d Cir. Oct. 30, 2009) ("in secondary effects cases such as this," citing *McCullen*); *Hoye*, *supra*, 642 F. Supp. 2d at 1035 (citing *McGuire I* to justify specific application of speech restrictive ordinance to abortion clinics).

II. THE EXEMPTION FOR CLINIC EMPLOYEES AND AGENTS RENDERS THE STATUTE CONTENT- AND VIEWPOINT-BASED.

As with the argument about the Act's focus on abortion clinics, the First Circuit also rejected Petitioners' challenge to the Act's exemption for clinic agents by citing its treatment of the analogous argument in *McGuire I*.

App. 14a (citing *McGuire I*, 260 F.3d at 45–47). Applying the most lax standard available ("whether a court can glean legitimate reasons for [a speech restriction's] existence"), the First Circuit ignored this Court's admonition that, like viewpoint-based restrictions, speaker-based restrictions in a public forum are constitutionally impermissible. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Other principles follow from this precept. In the realm of private speech or expression, government regulation **may not favor one speaker over another**") (emphasis added).

In *McGuire I*, the First Circuit reached the staggeringly counterintuitive conclusion that "the employee exemption [] is neutral on its face, drawing no distinction between different ideologies." *Id.* at 48. The only explanation for the court's facile assumption that employees or agents of an abortion clinic are not the ideological opponents of persons counseling against abortion is that it assumes that these employees and agents are motivated simply by their paycheck, not their beliefs.

Assuming *arguendo* that this is the case, the employee exemption runs afoul of still another First Amendment principle, namely, that restrictions on speech may not favor commercial speech over noncommercial speech. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513 (1981). Employees and agents of the clinic "acting in the scope of their employment," i.e., urging and assisting women to enter the clinic and obtain abortions, are engaging in commercial speech, "expression related solely to the economic interests of the speaker and its audience." *Nike, Inc. v. Kasky*, 539 U.S. 654, 678 (2003) (citing *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). A clinic employee whose job is to tell women, "We have

help," and "Don't listen to the demonstrators,"[6] is no different for this purpose than someone wearing a sandwich board sign reading, "A lunch at Joe's Eatery is just what you need. Accept no substitutes."

In practice, as shown in *Hoye v. Oakland*, *supra*, 642 F.Supp. 2d 1029, an exemption for clinic employees or fellow travelers "acting within the scope of their employment" provides ample room for getting across an ideological message. In *Hoye*, the district court held that volunteer "escorts" were exempt from the ordinance as long as they were "acting as escorts" rather than engaging in "pro-abortion advocacy"—thus begging the question of whether "acting as escorts" (like "acting in the scope of their employment") itself encompasses engaging in pro-abortion advocacy. "Acting as escorts" includes telling women not to listen to the pro-lifers, not to take their literature, that the literature is inaccurate, that the pro-lifers are only there to harass the women, and that the women will only be safe with the escorts. *Id.* at 1037–38. The district court did not consider any of this speech to be "pro-abortion advocacy." *Id.* at 1038–39.

Moreover, the holdings of both the district court and the First Circuit that clinic employees, agents, or escorts only violate the respective clinic laws when they engage in "pro-abortion" speech puts the police in the position of determining what is "pro-abortion" speech, a determination that requires far more than a merely "cursory examination" of the utterance. *Cf. Hill*, *supra* 530 U.S. at 722. Before these decisions, a reasonable person might have thought that a clinic escort or employee telling a patient not to listen to the pro-lifers or take their information would merit being called "pro-abortion" speech. But these courts say otherwise.

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[6] The First Circuit has held both these statements to be permissible under the employee exemption. *McGuire II*, *supra*, 386 F.3d at 64–65.

When an escort or employee says to a patient, "Stay close to me. I'll help you get into the clinic safely," these courts would undoubtedly hold that such speech was neutral and non-ideological. The peaceful pro-life speaker whose brief opportunity to speak to the patient has been poisoned by this admonition undoubtedly sees the matter differently.

As noted above, this Court's First Amendment jurisprudence has never recognized the concept of a justifiable or acceptable amount of content and viewpoint discrimination. Content and viewpoint discrimination are not subject to a balancing test wherein a court need only "envision at least one legitimate reason" for creating the distinction to render it constitutional. *McGuire I*, *supra*, 260 F.3d at 48. "The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Madsen v. Women's Health Center*, 512 U.S. 753, 794 (Scalia, J., concurring in part and dissenting in part). For that reason, the only "legitimate reason" for a content-based distinction is a compelling state interest, which has never been asserted here. A viewpoint-based distinction is simply impermissible.

The Court should grant the petition to prevent further erosion of the First Amendment's most fundamental guarantee, that of equal protection of all viewpoints in the marketplace of ideas.

CONCLUSION

The First Circuit's decisions in *McGuire I* and *II* and *McCullen* represent a radical departure from this Court's jurisprudence in the area of secondary effects and speaker-based discrimination in public fora. By providing a rationale for blatant viewpoint discrimination, *McCullen* and its predecessors are already undermining the raison d'être of the First Amendment: preventing government suppression of disfavored speech. These decisions invite legislatures in other jurisdictions hostile to pro-life speech to enact these and other creative restrictions on speech, secure in the knowledge that they will "escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express*, *supra*, 336 U.S. at 112.

Amici respectfully request this Court to grant the Petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ELEANOR MCCULLEN, JEAN BLACKBURN ZARRELLA, GREGORY SMITH, CARMEL FARRELL, AND ERIC CADIN,
Petitioners,

v.

MARTHA COAKLEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICAE CURIAE* DR. ALVEDA KING, MARLYNDA AUGELLI, SUSANNA BRENNAN, MOLLY WHITE, ESTHER RIPPLINGER AND MAGDALENA CASTRO IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICAE CURIAE*[1]

Amicae are women who attest to the importance of free speech in their abortion decisions.

Ms. Susanna Brennan had two abortions. She recalls the clinic staff in an "authoritative way, telling [her] in no way could [she] afford a baby," and presenting abortion as if "there was no other choice." She recalls that "[t]here was no other information given to [her] at all – nothing about getting financial and other assistance, what the actual act of abortion was, or what the after effects would do to [her]." She explains that her abortions contributed to her divorce, as well as battles with alcoholism, bulimia, and depression. She believes that "if someone had approached [her] outside of the clinic, [she] would be a proud parent today . . . ."

Ms. Molly White had two abortions. Before her first abortion, she "asked the clinic staff about . . . the risks of abortion," but was told here was no "risk of physical complications." She explains that her abortion caused continual bleeding, a damaged cervix, and uterine scarring, which led to two stillborn children and a miscarriage. She believes "[i]f someone had been outside the clinic offering

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[1] Counsel for both parties have consented to the filing of this *amicus* brief. Their written consents accompany this brief. Pursuant to S. Ct. Rule 37(a), counsel of record for all parties have received timely notice of the intention to file this brief. No counsel for a party authored this brief in whole or in part. The Pro-Life Legal Defense Fund, Inc. contributed the printing costs associated with the preparation and submission of this brief. Unless otherwise noted, all statements made by *amicae* are on file with counsel for *amicae curiae*.

help and information, [she] would have decided against abortion . . . the most regrettable decision of [her] life."

Ms. Esther Ripplinger had an abortion. She asked the clinic staff about the baby's stage of development, and was told "It's only a blob of tissue . . ." She later learned her baby actually had "hands, feet, and a beating heart." She was also told the procedure was "quick and painless" and would only cause "minor discomfort," but she later felt "excruciating pain." She suffered from depression and anxiety from the "worst decision she ever made . . ." She believes that "[i]f someone had given [her] information and alternatives as [she] walked into the clinic, [she] would not have made this choice."

Ms. Marlynda Augelli had an abortion. She was not given any "information on the development of the child," nor about the potential psychological side effects. She explains that her children after the abortion have "riddled [her] with guilt and remorse," since they are constant reminders that she "[threw] away" the life of her aborted child. She "wish[es] that [she] could have heard a counselor on the sidewalk before [she] walked into [her] doctor's office," because "[i]f [she] had heard of the risks beforehand, [she] could have made an educated decision" and not abort the child.

Dr. Alveda King, niece of Dr. Martin Luther King, Jr., had two abortions. She explains her abortions led to eating disorders, depression, nightmares, and sexual dysfunctions. Additionally, she struggles with guilt and anger, as well as an inability to bond with her other children. She "wish[es] that she had received more information

about abortion prior to [her] decision," because if she had seen a sonogram and known the increased risk of depression and cervical and breast cancer, "[she] never would have had an abortion."

Ms. Magdalena Castro came breathtakingly close to having an abortion. She recalls that even though she "didn't know anything about abortion," she "thought she had to [have one]," because the baby's father told her she could not afford a baby. When she arrived at the clinic, she met a sidewalk counselor who gave her information and a pamphlet about the abortion procedure, fetal development, and abortion alternatives. After receiving an ultrasound and seeing her baby's heartbeat, she "felt so happy" and decided to keep the baby. She explains that because the sidewalk counselor "gave [her] all the information about the abortion," she "did not make the mistake" that would have her made her "sad for the rest of [her] life." She believes "[i]t would be very, very sad if a person like me could not get this information."

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case because the decision below, which upheld Mass. Gen. Laws ch. 266, § 120E, undermines the very essence of the First Amendment. This Court has held repeatedly that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Without a vibrant and functioning marketplace, society loses "the best test of truth,"

which is the "the power of [a] thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting). Based on a misunderstanding of this Court's precedent, the decision of the First Circuit below undermines the functioning of the marketplace of ideas by upholding a law that restricts both the ability of speakers to get their message across, and of willing listeners to access critical information. The First Circuit decision below is the most extreme decision in a line of lower court cases that have misinterpreted this Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000). Because these decisions pose a grave threat to the First Amendment, this Court should intervene and set clear limits on the reach of *Hill*.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION BELOW IGNORES THE WELL-ESTABLISHED FIRST AMENDMENT RIGHT OF WOMEN, SUCH AS THE *AMICAE CURIAE*, TO RECEIVE INFORMATION ABOUT ABORTION.

By affirming the constitutionality of Mass. Gen. Laws ch. 266, § 120E, the First Circuit undermined the ability of Massachusetts women to make fully informed choices about abortion. The decision below, unprecedented in its breadth and scope, ignores important First Amendment principles laid down by this Court concerning the right to receive information. Because the rights at stake here are crucial to the purpose of the First Amendment, and because—as the stories of the *amicae* aptly demonstrate—the consequences of

their abridgement can be severe, this Court should grant certiorari and clarify the boundaries of this right.

"It is now well-established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). The purpose of the First Amendment is to ensure that civil society develops a marketplace of ideas so that the truth may be found. *See Red Lion Broadcasting Co.*, 395 U.S. at 390 ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."). This creation of a true marketplace of ideas requires that the rights of both speakers and listeners be protected. Nowhere is a robust supply of information more important than in difficult and crucial decisions about abortion, and *amicae* are ample evidence of the profound effects that receipt of information can have on individual choices. This Court has long recognized the importance of women making educated decisions about abortion. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) ("The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences."). Women have the right to receive information about abortion from counselors who have no economic interest in abortion, without interference from the state.

The strikingly broad decision of the First Circuit below ignored the burden Mass. Gen. Laws ch. 266, § 120E places on the rights of women

entering reproductive health centers. The Act prohibits a woman from having a conversation, receiving a leaflet, or engaging in any type of communication within a 35-foot fixed buffer zone. Unlike the previous version of the statute, which contained an exception for consensual communication, *see* Mass. Gen. Laws ch. 266, § 120E 1/2(B) (2000), the revised version of the statute prohibits all communication within the buffer zone. *See* Mass. Gen. Laws ch. 266, § 120E 1/2(B) (2007). The Act applies to invited and uninvited approaches alike, regardless of how peaceful and welcomed the speech is. If a woman entering a clinic affirmatively chooses to have any other type of communication with one of the appellants, appellant cannot enter the buffer zone to communicate. By restricting consensual speech, the First Circuit violated the right of women to receive information about abortion.

It is no answer to say that the women approaching an abortion clinic could walk outside the 35-foot radius created by the ordinance to talk to abortion counselors. Counselors attempting to communicate with women entering a reproductive health center are effectively prevented from peacefully initiating communications in a conversational tone. From 35 feet away, a conversational voice will be wholly drowned out by the loud background noise of city streets. If individuals like Petitioners are prohibited from attempting to approach to initiate a conversation, women like the *amicae* will likely never discover that there are people willing to have a calm and rational conservation with them about the consequences of abortion. Just as a speaker's First Amendment right entails a certain level of access to an audience, *see Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)) ("[t]he right

of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention"), so must a listener's right include some reasonably unfettered ability to know what information is available. A law that prevents a listener from knowing what information is available impermissibly burdens that listener's First Amendment rights. The Government has no interest in prohibiting willing listeners from communicating with speakers inside the buffer zone.

In *Hill v. Colorado*, this Court recognized that a buffer zone law without an exception for consensual speech would raise independent constitutional issues. In upholding an eight-foot floating buffer-zone law, this Court was careful to limit its reasoning only to cases where the statute at issue strikes "an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of *unwilling* listeners" 530 U.S. at 714 (emphasis added). This Court repeatedly emphasized the significance of the act's exception for consensual speech: it is "important . . . to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Id.* at 715-16 (emphasis added). Despite *Hill's* repeated admonitions, the First Circuit failed to consider the burden the Massachusetts statute placed on the First Amendment right of willing listeners to receive information about abortion procedures.

Further, there is no other source of neutral information about abortion readily available to women who visit reproductive health facilities in

Massachusetts. Unlike some other states, *see, e.g.*, Ohio Rev. Code Ann. §§ 2317.56(B)–(C); 18 Pa. Cons. Stat. Ann. § 3208(a)(2); Ga. Code Ann. § 31-9A-4(a)(2) Massachusetts reproductive health centers are not required to provide information about the consequences of abortion. Moreover, given the pecuniary interest reproductive health-care clinics have in providing abortions, it is eminently sensible to maintain a healthy skepticism of the objectivity and forthrightness of clinic personnel in advising patients about the nature of the abortion procedure and its potential risks.[2] The *amicae*, like many

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[2] Indeed, such skepticism is validated by the recent tale of Abby Johnson. Johnson served as the director of a Planned Parenthood clinic in Bryan, Texas. After nine years with the organization, she renounced her pro-choice views and quit as director. An important factor to her change of heart was the organization's response to the economic pressures of the current recession. According to Johnson, her superiors encouraged her to increase revenues by performing more abortions, which are by far the most lucrative service the clinics provide. *See* Joseph Abrams, Planned Parenthood Director Quits After Watching Abortion on Ultrasound (Nov. 2, 2009), http://www.foxnews.com/story/0,2933,571215,00.html (last visited Nov. 21, 2009).

The immediate cause of Johnson's change of heart is also illustrative of the degree to which abortion clinics hide the gory details of the practice from patients and personnel alike. Although Johnson had worked for Planned Parenthood for nine years and risen to the rank of clinic director, she had never observed an ultrasound of an abortion. When she did, she was forever changed. In Johnson's words, "I could see the whole profile of the baby 13 weeks head to foot. I could see the whole side profile. I could see the probe. I could see the baby try to move away from the probe." Anne-Marie Dorning, Planned Parenthood Clinic Director Joins Anti-Abortion Group (Nov. 5, 2009), http://abcnews.go.com/Health/MindMoodNews/planned-parenthood-clinic-director-joins-anti-abortion-group/story?id=8999720 (last visited Nov. 21, 2009).

women contemplating an abortion, insist that they needed information and did not get it from clinic personnel,[3] and in others they were even provided with misleading information.[4] While the First Amendment does not require that states provide information about abortion to women, it does prohibit a state from preventing third parties from circulating such information. Because Massachusetts does not require the dissemination of this information and because reproductive healthcare facilities are not neutral sources of information, it is especially crucial that the government not impede third parties, such as Petitioners, from making this information available to women contemplating abortion.

The Court should address these issues because serious consequences result when women decide to terminate their pregnancies without full information. The right to receive information about

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[3] *See, e.g.*, Statement of Susanna Brennan ("There was no other information given to us at all – nothing about getting financial or other assistance, what the actual act of abortion was, or what the aftereffects would do to us."); Statement of Marlynda Augelli ("I did not receive . . . any information about the life of the child growing inside of me or any information about the risk of physical and psychological side effects.").

[4] *See, e.g.*, Statement of Molly White ("I specifically asked the abortion clinic staff about fetal development and the risks of abortion. . . . I later found out that these two answers were untrue. The abortion clinic workers withheld vital information when I asked for it. . . . I also needed information about abortion alternatives . . . ."); Statement of Esther Ripplinger ("I was not made aware of the many community services available for pregnant women. . . . I asked the [clinic employee] about the baby's stage of development [and was given false information].").

abortion should receive special protection because of "the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion). As Justice Kennedy observed in his dissent in *Hill*, there is "[n]o better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time," 530 U.S. at 792, than the abortion protestor seeking to inform a vulnerable and often distraught young woman of the true nature of, and alternatives to, the irrevocable decision she is about to make.

The stories of *amicae* demonstrate that women do, in fact, experience regret when they choose to abort a child without knowing all the facts. Several *amicae* attest they have suffered psychologically and, in some cases, physically, as a result of abortion decisions made with incomplete, misleading, or false information.[5] The experiences of the *amicae* are representative of the experiences of many women. Empirical research on the

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[5] *See, e.g.*, Statement of Susanna Brennan ("I became an alcoholic, bulimic, clinically depressed and suicidal."); Statement of Molly White ("I suffered from a damaged cervix and uterine scarring. . . . In addition to the physical pain, I had longer-lasting emotional pain. . . . This has taken a heavy psychological and emotional toll on my life and the life of my family."); Statement of Esther Ripplinger ("I realized that my annual increased depression was the anniversary of the abortion. . . . I also became overly protective of my young son and feared he might die."); Statement of Marlynda Augelli ("I began to grieve the death of my first little one . . . . I was riddled with guilt and remorse and there was nothing I could do to stop those feelings . . . . ").

psychological effects of abortion suggests that a woman who has undergone an abortion may face a number of difficulties. There is a direct correlation between a woman's history of abortion and her risk of depression, suicide, drug dependence, and poor mental health. *See* David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health,* 47 JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY 16 (2006). A number of other studies have also found correlations between abortion and negative psychological outcomes.[6]

The stories of the *amicae* demonstrate that these consequences can, in some cases, be prevented if the state merely steps out of the way and allows the kind of rational moral discussion protected by the First Amendment to occur. Several *amicae* assert that they would not have chosen to have an

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[6] *See, e.g.*, Jesse R. Cougle et al., *Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth*, 19 JOURNAL OF ANXIETY DISORDERS 137 (2005) (anxiety); David C. Reardon et al., *Substance Use Associated with Unintended Pregnancy Outcomes in the National Longitudinal Survey of Youth*, 30 AMERICAN JOURNAL OF DRUG AND ALCOHOL ABUSE 369 (2004) (drug abuse); Jesse R. Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9 MEDICAL SCIENCE MONITOR CR105 (2003) (depression); David C. Reardon et al., *Psychiatric Admissions of Low-Income Women Following Abortion and Childbirth*, 168 CANADIAN MEDICAL ASSOCIATION JOURNAL 1253 (2003) (inpatient psychiatric admissions); Mika Gissler et al., *Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study*, 313 BRITISH MEDICAL JOURNAL 1431 (1996) (suicide).

abortion had they received accurate information.[7] *Amica* Magdalena Castro attests that the information she received from a counselor convinced her to carry her pregnancy to term rather than abort. The influence of the counselor's words was so strong that Castro asked the woman to be her child's godmother. *Amicae*'s stories illustrate the impact free speech can have on a woman's decision-making process. Information about abortion can have a life-altering effect, and the government should not deny a woman the opportunity to receive it.

II. THE ACT UPHELD BY THE FIRST CIRCUIT VIOLATES THE FIRST AMENDMENT BY LEAVING ABORTION COUNSELORS WITHOUT AN ADEQUATE CHANNEL TO COMMUNICATE THEIR MESSAGES.

The decision of the First Circuit below also puts an impermissible burden on the First Amendment rights of would-be sidewalk counselors

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[7] *See, e.g.*, Statement of Molly White ("If sidewalk counselors had been there to give me an independent source of information, I would not have made the two most regrettable decisions of my life."); Statement of Marlynda Augelli ("I did not receive . . . any information . . . about the risk of physical and psychological side effects. . . . If I had heard the risks beforehand, I could have made an educated decision and I would not have aborted my child."); Statement of Esther Ripplinger ("If someone had given me information and alternatives as I walked into the clinic, I would not have made this choice and paid this price."); Statement of Susanna Brennan ("I absolutely wish someone could have told me the truth and helped me. . . . I believe that if someone had approached us outside of the clinic, I would be a proud parent today . . . .").

and all individuals, including *amicae curiae* and Petitioners, who wish to speak peacefully to women visiting reproductive health clinics. Even if the First Circuit is correct that Mass. Gen. Laws ch. 266, § 120E is a time-place-manner restriction, the Act clearly fails to leave open alternative channels of communication as required by *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). In upholding the Act, the First Circuit assures us that the Act does nothing to prevent those standing 35 feet away from "speak[ing], gesticulat[ing], wear[ing] screen-printed T-shirts, display[ing] signs, [or] us[ing] loud speakers," *McCullen v. Coakley*, 571 F.3d 167, 180 (1st Cir. 2009) thus excising from the First Amendment the right to engage in rational discourse and preserving only a vulgar right to shout at distant passers-by. Most abortion counselors are not interested in shouting slogans in the vicinity of an abortion clinic; they instead aim to discuss the perils of abortion with those contemplating the decision to have one. Some ideas cannot be shared through simplistic T-shirt slogans or shouted over bullhorns.

Likewise, the First Circuit's insistence that "there is no constitutional guarantee of any particular form or mode of expression" is beside the point. *Id.* The Act does not merely forbid a certain medium of communication, such as picketing, but effectively prevents all communication on the complex and sensitive topic of the choice to have an abortion. Those seeking to communicate the type of information that *amicae* regretfully lacked are left with no way of doing so. The consequences of being prevented from communicating this type of information are immediate and irreversible; there is no second-best result and there are no second chances. *See*, *Hill*, 530 U.S. at 792 (Kennedy, J.,

dissenting) ("Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur."). The question, ultimately, is whether the First Amendment protects merely the right to cheer for one's own team or whether it protects the right to persuade through the free exchange of ideas. We respectfully ask this Court to grant certiorari and re-affirm the latter protection.

Finally, by preventing all speakers from even entering the buffer zone, the Act forecloses all types of free speech in a fixed area and therefore "burden[s] substantially more speech than is necessary to further the government's legitimate interest[]" in promoting public health and safety. *Hill*, 530 U.S. at 799. Indeed, because of the size of the buffer zone and the Act's lack of an exception for welcomed communications, speakers are foreclosed from even silently offering written information or peacefully inviting others to talk. Moreover, this intrusion is not necessary to achieving any statutory goal. It is clear that the First Circuit has effectively eliminated the narrow tailoring requirement by impermissibly expanding the meaning of this Court's statement in *Hill* that a restriction "may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Id.* The decision below displays its disregard for the narrow tailoring requirement by never even addressing how a rule excluding all speakers, even those silently distributing leaflets, from a fixed zone is remotely related to the governmental interest in public safety. Why does a complete ban on peaceful conversation and silent distribution of information fail to burden

"substantially more speech than is necessary"? We are not told.

III. THE FIRST CIRCUIT'S DECISION IS THE MOST FAR-REACHING IN A SERIES OF LOWER COURT RULINGS THAT MISUNDERSTAND THIS COURT'S DECISION IN *HILL V. COLORADO* AND ERODE FIRST AMENDMENT PROTECTIONS.

The First Circuit's decision below is based on a misunderstanding of this Court's content-neutrality analysis in *Hill*. In finding the Colorado statute in *Hill* to be viewpoint- and content-neutral, this Court was careful to limit its content-neutrality and viewpoint-neutrality determinations to the specific facts of that case. Necessary to its conclusion was the fact that the statute only minimally burdened the delivery of the Petitioners' message. Had the statute imposed a significantly larger bubble—with the result that one viewpoint was effectively silenced—the Court would have likely reached a different conclusion.[8] Moreover, despite its narrow reach, the Court's holding that the statute was both viewpoint and content neutral provoked two spirited dissents.

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[8] This supposition is especially probable given the reasoning of the four-Justice concurrence: "[T]he reason for [the statute's] restriction on approaches goes to approaches, not to the content of the speech ... the content of the message will survive on any sign readable at eight feet and in any statement audible from that slight distance. Hence, the implausibility of any claim that an anti-abortion message, not the behavior of the protestors, is what is being singled out." *Hill*, 530 U.S. at 738 (Souter, J., concurring).

Like the First Circuit below, lower courts have routinely misread *Hill* as exempting virtually all buffer zones from the strictures of viewpoint-discrimination and content-neutrality scrutiny. *See, e.g.*, *Brown v. City of Pittsburgh, 2009 WL 3489838* *7–*8 (3d Cir. Oct. 30, 2009) (relying on the gloss the First Circuit placed on *Hill* in *McGuire I*, 260 F. 3d 36, and the decision below, to find a 15-foot fixed buffer zone viewpoint- and content-neutral on its face); *Halfpap v. City of West Palm Beach*, 2006 WL 5700261, at *21–*22 (S.D. Fla. Apr. 12, 2006) (unpublished) (concluding that *Hill* required finding a 20-foot fixed buffer zone to be content-neutral, but adding that "[w]ere I writing on a blank slate . . . I would have viewed the Ordinance as content-based [because its] passage . . . was in response to speech-related activities occurring at a single abortion clinic . . . and was designed to restrict the protest, education or counseling by those who gather in the public spaces adjacent to the clinic in opposition to abortion."); *Hoye v. City of Oakland*, 642 F. Supp. 2d 1029, 1034-36 (N.D. Cal. 2009) (relying on *Hill* to uphold a floating buffer zone that applied only to abortion clinics as viewpoint-neutral).

These decisions pose a grave threat to the First Amendment. As this Court has recognized for more than a half century, "[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Kovacs*, 336 U.S. at 87. Yet nearly a decade of lower court precedent, based on a deeply flawed reading of *Hill*, deprives one particular group of speakers, with one particular message, of that fundamental right. Forced ever further from their intended audience by ever expanding buffer zones, pro-life educators and

counselors, however peaceful, civil and compassionate, are becoming increasingly precluded from delivering their message. These buffer zone laws make off-limits to these speakers the only plot of land on the surface of the planet where their message has any plausible likelihood of achieving its desired effect.

Such buffer zone laws as upheld by the court below, moreover, are particularly offensive to First Amendment values because they silence only one side in perhaps the profoundest and most deeply emotional political and moral debate of our day. Pro-choice advocates will be generally indifferent to a buffer zone surrounding abortion clinics. They do not need to stand in front of clinics to inform pregnant women of the precise scope of their abortion rights or to answer questions about the procedure itself, the safety precautions taken, or its potential aftereffects. Such information is readily available on the other side of the clinic's doors. But pro-life advocates have ample cause to worry that, if they are unable to deliver their message outside the clinic, prospective clients, like many of the *amicae*, are unlikely to receive detailed information about the stage of development of their unborn babies, the details of the abortion procedure, or the risks of long-lasting emotional, psychological and even physical harm.[9]

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[9] According to the Planned Parenthood website, "Most women ultimately feel relief after an abortion . . . Serious, long-term emotional problems after abortion are about as uncommon as they are after giving birth." Planned Parenthood, In-Clinic Abortion Procedures, http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.htm (last visited Nov. 21, 2009). Empirical research, however, raises serious doubts about the factual

Because lower courts have consistently adopted an overbroad reading of *Hill*'s viewpoint-neutrality reasoning, this Court should articulate clear limits on *Hill*'s holding. Specifically, this Court should clarify that *Hill* held the Colorado statute at issue to be viewpoint- and content-neutral only because its restrictions did not significantly burden speech of any viewpoint or subject matter in front of abortion clinics. The Massachusetts statute upheld by the court below, by contrast, should be declared viewpoint discriminatory on its face. The Massachusetts legislature specifically targeted only the public property surrounding abortion clinics—where sidewalk counselors have long offered information and support to pregnant women considering abortions—and created such vast no-speech zones that these pro-life counselors are for all practical purposes entirely precluded from delivering their message to their intended audience. Such an expansive speech restriction, applied only to a public forum where one particular viewpoint on one particular issue has traditionally been advocated, is far outside the bounds of *Hill*'s viewpoint-neutrality test and should accordingly be invalidated. If, however, such a restriction is consistent with *Hill*, the Court should consider overturning that case.

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accuracy of such a statement. *See, e.g.*, David M. Fergusson, et al., *Abortion in Young Women and Subsequent Mental Health*, 47 JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY 16 (2006) (finding a direct correlation between a woman's history of abortion and her risk of depression, suicide, drug dependence, and poor mental health). The testimony of the *amicae* also tends to negate Planned Parenthood's position.

CONCLUSION

For the foregoing reasons, *Amicae* respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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